90-1764

Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Should courts interpret collective bargaining agreements which require contributions to a multi-employer pension plan with reference to the history of the parties' customs, usages, negotiations and practices?

2. Should courts permit trustees of multi-employer plans to unilaterally define terms within the bargaining agreement in the absence any clause authorizing the trustees to do so?

3. Are drafters and negotiators of collective bargaining agreements required to anticipate interpretive difficulties which may confront pension plan trustees or, failing to do so, are the parties bound by interpretations propounded by the trustees?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to all proceedings below included all Petitioners, who are as follows: Independent Fruit and Produce Company; N.E. Friedmeyer-Sellmeyer Distributing Company; George A. Heimos Produce Company, Inc.; John Moon Produce Company; Stanley Produce, Inc.; Robert Johnson, d/b/a J. Johnson Fruit & Produce Company; Adolph A. Solomon and Ira Solomon, Statutory Trustees for Adolph & Ceresia Produce Company; United Fruit & Produce Company; Goldman Fruit & Produce; Franklin Produce Company; and Walter A. Rubin, d/b/a M.J.M. Produce Exchange.

The following parties were involved in the proceedings before the trial court and the appeal to the Eighth Circuit Court of Appeals. However, they were neither parties to the motion for rehearing by the Eighth Circuit panel nor

to the motion for rehearing en banc: Salvatore Pupillo, d/b/a Pupillo Fruit Company; Sugar Ripe Banana Company; William Mantia Fruit Company, Inc.; St. Louis Banana and Tomato Company, Inc.; Lamperson Fruit & Produce Company; Lombardo Fruit & Produce Company; Marske Produce; and Jules J. Schwartz and Joseph F. Schwartz, d/b/a New Market Produce Company.

Respondents before this Court, Central States, Southeast and Southwest Areas Pension Fund and its trustee, Howard McDougall, were parties to all proceedings below.

Petitioner, United Fruit & Produce Company, is a wholly-owned subsidiary of United Industries, Inc. Petitioner, George A. Heimos Produce Company, Inc., is a wholly owned subsidiary of CJB Leasing Co. No other Petitioner has any

parent company, subsidiary or affiliate to list pursuant to Rule 28.1.

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Petitioners respectfully petition this Court to issue a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Eighth Circuit entered on December 6, 1990.

OPINIONS BELOW

A full opinion of the district court was rendered only in the case of N.E. Friedmeyer-Sellmeyer Distributing Co. ("Friedmeyer-Sellmeyer"). That unreported opinion and judgment are set forth in the Appendix (A66-94). The opinions of the district court in the remaining Petitioners' cases adopt the opinion in Friedmeyer-Sellmeyer. Those opinions and judgments are also unreported (A95-143). The opinion of the court of appeals is reported at 919 F.2d 1343 (1990) and set forth in the Appendix (A13-65).

JURISDICTION

The judgment of the court of appeals was entered on December 6, 1990 (A1-12). Petitions for rehearing en banc and by the panel were denied on February 11, 1991 (A144-55). Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1).

Jurisdiction of the federal district court was originally invoked under 29 U.S.C. Sections 186(a) and 1132(a) and Section 306 of the Multiemployer Pension Plan Amendments Act of 1980.

STATUTES INVOLVED

The statutes involved are 29 U.S.C. Sections 186 and 1145 attached in the Appendix (A156-63).

STATEMENT OF THE CASE

1. Introduction

Petitioners are thirteen fruit and vegetable wholesalers operating primarily in the St. Louis, Missouri metropolitan area. As members of a multi-employer collective bargaining group known as the St. Louis Fruit and Produce Association ("Produce Row"), they are signatories to a series of agreements with a Teamster local. Along with approximately 5,000 other businesses, Petitioners' collective bargaining agreements require contributions to Central States, Southeast and Southwest Area Pension Fund ("Central States").

These collective bargaining agreements span consecutive three-year periods beginning in the 1950s and have generally involved approximately twenty-five employers, including Petitioners.

They divide the bargaining unit into three categories of employees: probationary employees, regular employees and employees who are "known as 'casual employees' (casuals)." A166, 173, 178, 182. Contributions to Central States are required only on behalf of regular employees. All collective bargaining agreements require Petitioners to assent to the rules and regulations of the Central States pension plan. Those rules require Petitioners to report the names of the individuals for whom contributions are owed and to remit those contributions to Central States.

However, all agreements specifically relieve Petitioners from any obligation to make pension contributions on behalf of casual employees. The pre-1982 agreements exclude the casuals from all

fringe benefits. Article IX, Section 2., subsection 4 of the contracts provides:

> Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LIH [a Union sponsored health plan], Welfare, Medicare, Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

(A167, 174, 179, 184) (emphasis added). Under the same section, casuals are not guaranteed any hours of work. Later, the 1982-85 agreement provides casuals with four (4) paid holidays but no other benefits. That agreement requires Petitioners to furnish the Union a list of employees, segregating regulars from casuals.

Central States is one of the largest ERISA trust funds in America: its assets on December 31, 1988 exceeded $9 billion; it receives contributions on behalf of more than 250,000 active workers; it is

responsible for benefits to over 125,000 retirees. During calendar 1988, Central States received more than $746 million in contributions. While the Central States plan has been amended many times, no amendment authorized the trustees to determine eligibility for coverage nor the identity of those for whom contributions are made. These questions have always ben determined by the Union and Petitioners in negotiation of the collective bargaining agreements. See Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 571, n. 12 (1985) (under ERISA standard of loyalty to the beneficiaries, an audit of an employer by pension fund would not be legitimate if it were an attempt "to expand plan coverage").

The courts below were faced with the problem of determining the meaning the phrase "known as casuals" under the collective bargaining agreements. The district court examined the parties' agreement concerning the identity of casual employees through evidence of the history of their negotiations and all other relevant factors, except the district court refused to consider any oral modification of the collective bargaining agreements.[1] The trial court found, as a fact, that the persons called "casuals" by Petitioners are excluded from the pension plan as Petitioners and

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[1]In fact, no evidence of any oral modifications was offered by Petitioners as such evidence is beyond the cognizance of a court when offered to excuse an obligation to make pension contributions. Lewis v. Benedict Coal Co., 361 U.S. 459 (1960).

the Union agreed in their written collective bargaining agreements. The district court held that Petitioners had made contributions for regular employees as agreed.

The court of appeals found, however, that those persons "known as casuals" to the employers, Union and the employees could not be casual employees because the regularity of their work brought them outside the definition of "casual employment" found in Black's Law Dictionary requiring that such employment be intermittent. Based on the Black's entry for casual employment, the court of appeals found that the definition of casual employee was unambiguous. This dictionary definition was substituted for the parties' understanding of "known as casual." Because of this definition, the appeals court held that the trial judge

erred in examining the Petitioners', the Union's and the employees' conduct, practice or intent. As many of the casuals were non-intermittent employees, they should, in the judgment of the court of appeals, have contributions paid on their behalf.

Accordingly, the appeals court found no need to address the record before the trial court. The record clearly demonstrates that the history of the agreements and the practice of the parties relieves Petitioners of the burden of contributions for these employees. There is no evidence that the parties believed employees "known as casuals" were to be employed only on an intermittent basis. No witness at trial testified to personal familiarity with a contract using the term "known as casual" or even "casual employee" in such a

limited sense. More importantly, not a single witness testified that Petitioners or the Union had used these terms in such a confined manner during the thirty (30) year bargaining history.

The appellate decision does not find error in the district court's determination that casual employees were clearly excluded from fringe benefits pursuant to the parties' collective bargaining agreement. The court of appeals does not suggest that casual employees could not have been lawfully excluded from pension coverage had they been denominated by some term not found in Black's Law Dictionary, such as "red hats." Doubtless, had casuals been designated by a term carrying no connotation or denotation, their exclusion could have been accomplished. See, UMWA Health and Retirement Funds v.

Robinson, 455 U.S. 562 (1982). The collective bargaining process clearly allows the interests of the casual employees "to be subordinated to the collective interests" of the bargaining unit. Barrentine v. Arkansas Best Freight System, Inc., 450 U.S. 428, 435 (1981). The appeals court does not question the district court's finding that Petitioners performed their agreement to contribute on behalf of regular employees. They, the Union and the employees, all knew that casuals were excluded and knew who were casuals.

Use of "casual employees" is not confined to Produce Row or any particular industry. A study by Cleveland State University commissioned by Petitioners of a data base of 500 collective bargaining agreements randomly selected from a universe in excess of 3000 contracts

discloses the terms "casual" and "casual employee" vary with each employer's circumstances. A185-220. These terms are used to describe a wide range of workers --including at one extreme, workers who "work on a regularly scheduled continuing basis, for a usual specified number of hours from 1-31 per pay period" (A188), employees "who are not on the regular seniority list" (A189), "on a daily basis" (A197), and, at the other side of the spectrum, employees "work solely on call" (A196) or "normally work less than twenty (20) hours per week" (A208). It includes employment which "can be full-time" (A198) and may be "permanently assigned" (A220).

2. Procedure in the District Court.

In 1983, Central States performed a random audit of Lamperson Fruit & Produce Co., which is not a petitioner although

it was a defendant in the district court. In the course of the audit, the employer informed the auditors that casuals were widely used on Produce Row for lengthy periods. Following up on that information, the auditors spoke with Union personnel who confirmed that casuals might work for several years and remain excluded from pension contributions.

Thereafter, Central States brought substantially identical complaints against all Petitioners alleging that Petitioners failed to properly remit contributions to Central States. The complaints request audits of Petitioners' books and records and demand judgment upon the audit results. They further allege that Petitioners are squandering assets and request appointment of a

receiver. The requests for a receiver were denied by the district court.

Following a hearing to establish safeguards in the audit process, Central States examined the books and records of the employers for the years 1979 through 1987. It assessed liability for employees "known as casuals" to the employers and the Teamster local. Central States maintained that contributions were due for all steadily employed members of the collective bargaining unit who were beyond the probationary period.

3. The Factual Context.

In order to conserve the Court's resources, the district court designated N.E. Friedmeyer-Sellmeyer as the lead case on the issue of the meaning of the term "known as casuals." Adhering to this Court's principles for

interpretation of collective bargaining agreements, the district court considered "the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 161 (1966). A83-84.

The district court determined the parties' identification of casuals was intertwined in a long history of dealings. Originally, casuals had been utilized as replacement workers to level labor demands which were "irregular and unpredictable." A85-86. Later, casuals were essentially a second tier of labor performing the same tasks as regulars for extended periods. Before 1982, casuals and regulars were distinguished primarily by the regulars' receipt of fringe

benefits, accrual of seniority, and higher pay. A78. There were also visible distinctions between casual and regular employees: regulars wore Union pins and utilized different time cards than casuals. Prior to 1982, casuals were not Local 688 members. Id. Thus, the trial court rejected Central State's contention that there is a standard definition of "casual employees" to which all signatories of labor agreements must conform. The district court's detailed analysis of the agreements in light of Produce Row operations and the collective bargaining history, inexorably lead to its conclusion that the agreements "clearly excluded casual employees from the benefits afforded regular employees," including pension contributions. A89. The trial court found:

> no secret agreements, false representations, oral modifications or other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed--they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

(A89-90).

REASONS FOR GRANTING THIS PETITION

The court of appeals' decision should be reviewed because its method of interpreting labor contracts conflicts with an unbroken string of decisions of this Court. By applying different rules to interpret labor contracts when a pension fund is a party, the appeals court has placed long-settled agreements between unions, employees, and employers in jeopardy of being judicially rewritten to the detriment of institutionalized collective bargaining and labor peace. The appeals court's method of

interpretation permits pension fund trustees to construe collective bargaining agreements without regard for the parties' intent. This conflicts with the principle that the agreement of the parties is the source of the employer's obligations to make contributions. Inconsistent with this Court's decisions regarding collective bargaining agreements as generalized codes governing the employer-employee relationship, the appellate court's decision places an impossible burden on drafters of collective bargaining agreements. Specifically, it requires the drafters to identify language which, while crystal clear to them, may be subject to varying interpretation by non-party trustees unfamiliar with the trade practices, usages and customs of the parties.

1. **The Court of Appeals Fails to Follow the Principles of Labor Contract Interpretation Required by this Court.**

By confining its interpretive enterprise to the pages of a dictionary, the court of appeals disregards the intention of the parties, thus failing to adhere to the rulings of this Court which require that foremost importance be given to the parties' intentions. The appeals court's mode of contract interpretation is one most likely to reach a conclusion not in accord with the parties' understanding. This Court has repeatedly insisted that all contracts, including labor agreements, be construed to reach a fair understanding of the parties' intentions. Usages of the parties, such as their commonly held definition of "known as casuals," are interpretive

tools to which courts must refer. Usages are employed:

> [t]o aid in the interpretation of the meaning of the express language of an agreement, . . . [and] to annex terms to the agreement in accordance with the usage, provided they are consistent with the express language or manifestations of intention, though they may contradict or vary implications which would otherwise be drawn from the written . . . expression of the parties.

W. Jaeger, 5 Willston's A Treatise on the Law of Contracts 1-2 (1961).

The same treatise continues:

> [I]t may be said broadly that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning of the language employed. Usage is an ordinary means of proving the local or technical meaning of language and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstance of the case, a meaning different from its normal sense.

(Id. at 6-7).

In a non-labor context, this Court held over a century ago that "parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication" in the absence of language to the contrary. Hostetter v. Park, 137 U.S. 30 (1890).

In the labor law realm, an unbroken stream of decisions from at least United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), to Firestone Tire and Rubber Co. v. Bruch, 489 U.S. ---, 109 S.Ct. 948 (1989), interprets agreements with reference to the parties' intentions, which may be manifested through their usages. It is notable that the appeals court, presented with numerous citations of cases from this Court, fails to mention even one in its opinion.

The appellate opinion deviates from the mandate of this Court that the "law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." NLRB v. C&C Plywood Corp., 385 U.S. 421, 430 (1967). The Eighth Circuit's prior adherence to this rule in such cases implies that its departure is attributable only to the involvement of a pension fund in what it views as a "simple collection action." 919 F.2d, at 1348. The dangerous essence of the court of appeal's decision is that past, current and future labor agreements will be interpreted without reference to the intention of the negotiating parties when a pensions funds' rights are in the balance. The appeals court's decision upsets the economic expectations of Petitioners and the Union. Petitioners

will have to pay pension benefits on a group of employees that they and the Union intended to exclude from the pension contributions. The effect, then, is the retroactive assessment of pension contributions for a significant number of years which may be an economic burden imperiling the continued operation of Produce Row and continued employment of the workers.

Petitioners simply contend that as a matter of written contract, the individuals for whom Central States claims contributions are those persons "known as casuals" as that term is used in thirty years of collective bargaining agreements. The district court so found. Questions of fringe benefits coverage under labor agreements can be resolved only by the parties. UMWA Health and Retirement Funds v. Robinson, 455 U.S.

562 (1982). In saddling this case with the disparaging label of "simple collection action", the appeals court overlooks that the dispute revolves entirely around "both the existence and extent of the employer's liability." Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., 484 U.S. ---, 108 S.Ct. 830, 837 (1988). Such matters are not the simple collection actions toward which Congress expressed its abhorrence in passing Section 515 of ERISA (29 U.S.C. Section 1145). In Petitioners' case the only dispute is one of contract interpretation. Thus, these cases could have as easily been filed as suits for declaratory judgment.[2] In

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[2]The record of the one audit conducted by Central States prior to filing suit indicates that the trustees were well aware of the nature of the dispute. To

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ascertain the actual intent of the parties regarding how "casuals" were defined and utilized on Produce Row, Central States sought out the Union business agents who had been assigned to Produce Row. One informed them that "There is no limit to the number of casual employees compared to regular employees," and:

> [C]asuals can work full time for a long period of time (for example 10 years) without becoming regular . . . the employer decides who and how many employees they want to hire as casuals and how many employees they hire as regulars.

(A221).

Another business agent told them:

> Casuals don't necessarily work full time. But it is possible for casuals to work full time for a period of years. I asked then how could I distinguish between the two. He said casuals are hired as casuals & regulars get Pension contributions paid on them.

(A223) (emphasis in original of auditors' notes).

This as well as other conversations lead to the auditors' conclusion that:

fact, a single declaratory judgment suit could and perhaps should have been filed.

The court of appeals did not disagree with the trial court's factual findings. It did not cavil with the district court's conclusion that the parties intended that no contributions be made to Central States on behalf of persons known to the Union and Petitioners as casual employees. It found, however, that the term "casual employee" was unambiguous. The asserted unambiguity relieved the court of appeals from considering evidence of the parties' practice and conduct under the

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> The company has not remitted pension contributions for a number of employees with solid work history (forty hours per week, fifty-two (52) weeks per year). They perform the same work as employees reported to the Fund, but receive a lower hourly wage.

agreements. The appeals court found (and Petitioners admit) that many of the employees for whom Central States seeks contributions were not within the ambit of the dictionary definition. In essence the appeals court disregarded the clear intention of the Union, Petitioners and the employees themselves that a group called "casuals" were excluded from the pension contributions regardless of the regularity of their employment. This appeals court analysis followed solely from the definition in Black's Law Dictionary (5th ed. 1979) of "casual employment" (not "casual employee") which states:

> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

This is precisely the type of abstract definition which should not form the sole tool for construing a labor contract. C&C Plywood, at 430; F. Elkouri & E. Elkouri, How Arbitration Works 352 (4th ed. 1985). Application of such a definition is left to the district court upon remand. Being abstract, the definition lacks utility in application.

The Cleveland State University study confirms that there are nearly as many linguistic usages for "casual employee" as there are collectively bargained agreements. Use of the term depends upon the industry, the locale and most importantly, the specific parties' intent. The linguistic uses of "casuals" follow their use in the workplace.

Other cases using "casual employee," "casual" and similar terms also yield mixed results. For example, in Rupe v.

Spector Freight Systems, Inc., 679 F.2d 685 (2d Cir. 1979), the contract specified that a casual was "Any employee hired as a casual or part-time worker . . . where it has been agreed by the Employer and Union that he was hired for casual or part-time work." (At 689). In Rupe, casuals and regulars were indistinguishable on the basis of job duties and hours of employment. Other definitions are contained in other contracts which are treated in cases such as B.G. Costich & Sons, Inc. v. NLRB, 613 F.2d 450 (2d Cir. 1980), and Lehman v. Yellow Freight System, Inc., 651 F.2d 520 (7th Cir. 1980). These citations are not exhaustive of the cases or circuits which have considered the terms "casual" and "casual employment." E.g., Tatum v. Frisco Transportation Co., 626 F.2d 56 (8th Cir. 1980). Those cases cannot

pretend to scratch the surface of the collective bargaining agreements utilizing those terms in varying ways.

For these reasons, this Court has avoided formulating unbending rules of labor contract construction which thwart the parties' intentions. Courts cannot be so limited when they recognize that a labor contract involves more than a simple relation between the parties. Such contracts engender and encompass the "entire employment relationship" and invoke the "common law" of a trade, industry or shop. United Steel Workers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 579 (1960). Reaching the parties' intention is the goal of contract interpretation whether the rights of a pension plan or other parties are affected. Firestone Tire and Rubber Co. v. Bruch, 489 U.S. ---, 109 S.Ct.

948, 955 (1989). To do so courts must "consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Transportation-Communication Employees Union v. Union Pacific R.R. Co., 385 U.S. 157, 161 (1966).

In Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), the issue involved the forum in which the trustees were required to press their claims, i.e., arbitration or federal court. This Court found that the parties in Schneider had not contemplated the trustees; thus, they had no intent to bind the trustees to arbitration. That lack of intent and the concerns of Congress found in the MEPPA amendments to ERISA lead this Court to the conclusion that the parties had not bound the trustees to arbitration.

The Court stated, however, that the parties could by explicit agreement bind the trustees to use arbitration.

The appeals court's disregard of the parties' intent implicitly invokes the only judicial exception this Court has created to the rule that labor contracts are to be construed with an eye to discovering the parties' intentions: when the union and the employer orally agree to disregard a written contract to the detriment of the pension plan and covered employees, no waiver of pension contributions will be enforced against the pension fund trustees. Lewis v. Benedict Coal Co., 361 U.S. 459 (1960). This result is mandated by the provisions of 29 U.S.C. Section 186(c)(5)(B) requiring pension agreements to be placed in writing. The teachings of Benedict Coal receive vigorous application by the

circuits in pre- and post-ERISA cases. E.g., Bituminous Coal Operators' Ass'n, Inc. v. Connors, 867 F.2d 625 (D.C. Cir. 1989) (unilateral and mutual mistake of fact are not defenses); Nachwalter v. Christie, 805 F.2d 956 (11th Cir. 1986); Operating Engineers Pension Trust v. Beck Engineering & Surveying Co., 746 F.2d 557 (9th Cir. 1983); Mo-Kan Teamsters Pension Fund v. Creason, 716 F.2d 772 (10th Cir. 1983) (dicta), cert. denied, 464 U.S. 1045 (1984); Waggoner v. Dallaire, 649 F.2d 1362 (9th Cir. 1981) (fraudulent inducement of employer to enter agreement to contribute not a defense), cert. denied, 475 U.S. 1064 (1986); Lewis v. Seanor Coal Co., 382 F.2d 437 (3d Cir. 1967), cert. denied, 390 U.S. 947 (1968).

It is important to note that this line of cases does not involve interpretation of a promise to pay

contributions, but a claimed defect in contract formation or a superseding modification of the obligation. In these cases the problems arise either contemporaneously with or shortly after the initial obligation. Resolution does not entail a court employing a judicial saw against the grain of thirty (30) years of the parties' dealings. Petitioners' cases require judicial construction of an effective, written, unmodified promise to pay, i.e., what did Petitioners, the Union and the employees agree to do in consideration of the others' obligations under the collective bargaining agreements? As will be elucidated in Section 3 below, the Benedict Coal line of cases does not involve situations where the parties were unable to protect themselves against a surprising result by legitimate, readily

available means: an oral modification can be satisfactorily reduced to writing. However, the common law of the workplace, by its very nature, is not so easily susceptible to codification.

Although it cited neither Benedict Coal nor its progeny, the appeals court must have invoked this exception, since there is no other arguably pertinent ruling case from this Court permitting judicial disregard of the parties' intentions. Invocation of Benedict Coal is inappropriate in Petitioners' cases since the district court found, and the appeals court did not dispute, that there were no agreements reached not to abide by the written agreement. The only question to be determined is the meaning of the parties. The court of appeals does not disagree that the employees called "casuals" were beyond the

obligation of the employers to contribute as understood between the Union, Petitioners and their employees; the opinion simply limits itself to the dictionary definition of "casual employee" and consequently finds that the employees who were known to the contracting parties as casuals were not casuals in fact.

2. **The Appeals Court Allows Pension Trustees Unfettered Discretion in the Interpretation of Collective Bargaining Agreements to the Detriment of the Collective Bargaining Process in Disregard of Decisions of this Court.**

The collective bargaining process assumes that the parties fully negotiate to reach an understanding of their obligations and benefits, or failing to reach agreement, they engage in economic sanctions. NLRB v. Amax Coal Co., 453

U.S. 322, 336 (1981). Thus, trustees are bound to accept collective bargains as they find them and are without power to obtain contributions not required under the collectively bargained agreements. Id. at 336; Central States Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S. 559, 571, n. 12 (1985). The collective bargaining process operates successfully for only so long as the parties are certain that their understandings are not subject to rewriting or renegotiation by outsiders. The circuit court, however, subjects the bargaining process to two forms of unrestrained meddling by the trustees.

First, the appellate opinion grants unrestrained deference to Central States' interpretation of the contracts. The circuit court believes that "Central States thought it knew what the employers

meant by 'casual employee' because of that term's common meaning" 919 F.2d, at 1350. To the trustees this confides the right, subject to no standard, to read the contract and nothing more. Not even "good faith" controls the trustees.[3] Permitting such an unrestrained review gives the trustees power to rewrite an agreement to which they are not a party potentially destroying the economic relationship between the parties.

This potent weapon is not available to any party. Cases from this Court make it plain that such a weapon is

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[3]In matters of contract interpretation, Central States' own audit procedure requires discussion contract language with the parties. When that was done in this case, Central States found the parties unanimous in understanding that casual employees could perform the same jobs as regulars for extended periods without being reclassified as regulars. The results of those discussions appear at footnote 2.

unavailable to the trustees in any other context and, as a matter of policy, should not be utilized here. For example, a clause allowing pension trustees the right to make a good faith interpretation of a trust instrument permits their interpretation only "significant weight." Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc., 472 U.S., at 568; Firestone Tire & Rubber Co. v. Bruch, 489 U.S., at---, 109 S.Ct., at 955. However, in the absence of such a clause, even the trustees will be bound by the settlor's intention which must be discerned using the tools of contract construction. Firestone, 109 S.Ct. 955.

In this case, the trustees have no colorable claim to interpret the documents which are not trust instruments, but collectively bargained

agreements. Manifestly, it is not the pension fund that determines the extent of coverage. Coverage is an issue confided to the contractual relation of the parties whether that issue is determined fairly or unfairly. UMWA Health and Retirement Funds v. Robinson, 455 U.S. 562 (1982). As these coverage questions rely upon the parties' agreement, they must be subject to the typical rules of contract interpretation.

Second, the appeals court implies that significant weight is to be given to the trustees' actuarial assumptions. This is contrary to this Court's decisions confining trustees to a neutral role in labor disputes. Amax Coal Co., at 336-37. The appeals court finds there would be significant actuarial detriment to accepting contributions exclusively for regular employees since it believes

they are those most likely to receive benefits upon retirement. 919 F.2d, at 1348.[4] According to the appellate court, the trustees would have been unlikely to accept the Produce Row collective bargaining agreements had they known of the interpretation of "casual employees" given by the parties. Conversely, Petitioners would have been unlikely to execute the agreements had they known of the interpretation which would be given by Central States years after negotiations were over and after the employers had relinquished their right to obtain other economic concessions from the Union or lock out all employees,

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[4]At trial no actuarial evidence was presented. The evidence adduced showed that many casuals work for sustained periods of time, like regulars. That is facially inconsistent with the belief that casuals are more or less likely to make claims for benefits than regulars.

casuals and regulars alike. The trustees' only duty is one of strict loyalty to the plan's beneficiaries and participants. Amax Coal Co., at 329-30. They have no power to negotiate or participate in deliberations regarding the agreement between employer and union. Id., at 334. Permitting the trustees to interject actuarial assumptions into the interpretation of the collectively bargained agreement after the fact, confides in them more than mere negotiating power. It grants them the proscribed power to "require employer contributions not required by the originally collectively bargained contract." Id., at 336.[5]

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[5]The Eight Circuit's reliance upon actuarial assumptions may also mask an invalid argument that casual employees may make claims against the trustees alleging entitlement to benefits. Article VIII of the collective bargaining agreements

By allowing the unfettered trustees to subject contracts to arbitrary dictionary definitions, the appeals court throws a pale upon years of labor negotiations and hundreds of contracts, including many unearthed in the Cleveland State University study. This Court has made clear that labor agreements cannot be torn from their context. Words must be read in light of the history of the parties' dealings and trustees have no

---

provides a grievance procedure for all disputes arising under the contracts and is available to any employee claiming misclassification. On one occasion, two employees elected to utilize this procedure. Following Union rejection of their claim, they filed an unfair labor practice charge against both the employer and the Union. The NLRB affirmed their classification as casuals. Failure of other employees to initiate a grievance through the available procedure precludes them pursuing benefits from Central States. Republic Steel Corp. v. Maddox, 379 U.S. 650, 657-58 (1965).

special power or ability to read and interpret these words.

3. **The Appeals Opinion Requires the Parties to Carry an Impossible Drafting Burden which is Inconsistent with Federal Law and the Purposes of Collective Bargaining Agreements.**

The appeals court finds that Section 515 of ERISA "requires that what the parties to the bargaining agreement intended must be made clear from its face." 919 F.2d, at 1352. The net result is that if the employer and union intended a slightly different meaning than that expressed in any dictionary selected by a court, this must be made clear to pension fund trustees. The nature of labor agreements make this an impossible burden. No other court has imposed this requirement and Section 515 cannot be read in such a way.

Labor agreements are more than a mere amalgam of words following in logical and grammatical order. Collective bargaining agreements are drafted and negotiated against the background of the common law of the shop which implements and furnishes its context. The particular practice, usage and customs of the workplace must be integrated into the agreement. Even the negotiators may be unaware of "many of the specific practices . . . except in hazy form." United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 580-81 (1960). Again, this Court has long recognized that the "law of labor agreements cannot be based upon abstract definitions unrelated to the context in which the parties bargained." NLRB v. C&C Plywood Corp., 385 U.S., at 430 (1967).

This Court's decisions recognize the intensely practical aspects of collective bargaining agreements. See Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. 728, 735 (1981). While occasionally the parties may realize there is an ambiguous area needing clarification, it is far more unsettling if they believe their accord is clear. The negotiators may not recognize these hazy areas. In over thirty (30) years of collective bargaining, neither the Union, Petitioners nor their employees believed there was any ambiguity surrounding the phrase "known as casuals." It is unlikely that any of the 334,000 individuals identified by the Cleveland State University study are aware that they may not be casuals as that term is now judicially defined.

The court of appeals imposes upon employers the impossible obligation to identify interpretive difficulties which they may not know "except in hazy form." The parties have lived with these agreements and with their practices for too long to view them from the outside. But the appeals court requires not that these hazy areas be identified from the perspective of the parties, but from the vantage of a third-party trustee who is barred under Amax from participating in the negotiations.

The parties cannot identify such fuzzy areas until after the fact when faced with a contributions claim leveled against the employer. This is contrary to the purpose and spirit of collective bargaining which requires that the parties have knowledge of the substance and intent of their agreement. The court

of appeals permits this intent and the economic consequences of the agreement to be rewritten, and thus, destroyed long after the agreement has been performed by the parties.

Petitioners agree that trustees are not bound by unwritten understandings of the parties which contravene the written document. This rule is reasonable. If the parties wish to alter the terms of their bargain, consistent with 29 U.S.C. Section 186 (c)(5), they may execute a written amendment. Passage of Section 515 indicated Congressional approval of Lewis v. Benedict Coal Co. However, Congress' action did not indicate, nor does the legislative history intimate, that there were to be a new and different rules for interpretation of the written words of collective bargaining agreements. No employer, union or

employee can determine whether the denotative meaning of words used precisely squares with the meaning they hold in common when gathered around a heated bargaining table. Under these circumstances, they have no inkling that a written amendment is appropriate. Leaving interpretive difficulties to be resolved years later on the basis of the trustees' dictionary provides labor negotiators with only the certainty that they know not what they negotiate.

CONCLUSION

The court of appeals has placed all parties to collective bargaining agreements requiring pension contributions in jeopardy of having such agreements judicially rewritten based on pension fund trustees' understandings of such agreements. Alternatively, the appellate court requires that labor

negotiators do the impossible by identifying terms and portions of contracts which, while clear to them, may be subject to misconstruction by pension trustees. Such a duty is inconsistent with the fundamental purposes of labor agreements. The decision places unbargained burdens upon the employer and by upsetting the economic understanding, throws into doubt employers' continued viability.

For these reasons, Petitioners respectfully request this Court to issue a Writ of Certiorari.

Respectfully submitted,

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90-1764

No.

Supreme Court, U.S.
FILED
MAY 17 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

APPENDIX TO

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,	*	FILED Dec. 6, 1990 Robert D. St. Vrain Clerk
v.	*	
INDEPENDENT FRUIT AND PRODUCE CO., a Missouri corporation, Appellee.	*	

No. 89-1928

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,	*	Appeals from the United States District Court for the Eastern District of Missouri.
v.	*	
WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE, Appellee.	*	

No. 89-1929

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SUGAR RIPE BANANA COMPANY,
Appellee.

No. 89-1933

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

N.E. FRIEDMEYER-SELLMEYER, DISTRIBUTING COMPANY,
Appellee.

No. 89-1934

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SALVATORE PUPILLO, d/b/a PUPILLO FRUIT COMPANY,
Appellee.

No. 89-1935

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GEORGE A. HEIMOS PRODUCE COMPANY, INC.,
Appellee.

No. 89-1936

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WILLIAM MANTIA FRUIT COMPANY, INC.,
Appellee.

No. 89-1937

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ST. LOUIS BANANA AND TOMATO COMPANY, INC.,
Appellee.

No. 89-2204

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

LAMPERSON FRUIT & PRODUCE COMPANY, Appellee.

No. 89-2205

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

LOMBARDO FRUIT AND PRODUCE COMPANY, Appellee.

No. 89-2206

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JOHN MOON PRODUCE COMPANY,
Appellee.

No. 89-2207

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

STANLEY PRODUCE, INC.,
Appellee.

No. 89-2208

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ROBERT JOHNSON, d/b/a J. JOHNSON, FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2209

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ADOLPH A. SOLOMON AND IRL S. SOLOMON, STATUTORY TRUSTEES FOR ADOLPH & CERESIA PRODUCE CO.,
Appellees.

No. 89-2210

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

UNITED FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2438

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GOLDMAN FRUIT & PRODUCE CO., INC.,
Appellee.

No. 90-1160

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JULES J. SCHWARTZ AND JOSEPH F. SCHWARTZ, d/b/a NEW MARKET PRODUCE COMPANY,
Appellees.

No. 90-1161

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

FRANKLIN PRODUCE COMPANY, a Missouri Corporation,
Appellee.

No. 90-1162

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

MARSKE PRODUCE COMPANY, INC.,
Appellee.

No. 89-2839

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

GEORGE A. HEIMOS PRODUCE CO., INC.,
Appellant.

No. 89-2840

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

N.E. FRIEDEMEYER-SELLMEYER DISTRIBUTING COMPANY,
Appellant.

JUDGMENT

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in this cause is reversed and cause is remanded to the district court for proceedings consistent with the opinion of this Court.

The judgment of the district court denying the employers' request for attorneys fees is affirmed.

December 6, 1990

ORDER ENTERED IN ACCORDANCE WITH OPINION
/s/
Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,	*	
Appellants,	*	
v.	*	
Independent Fruit and Produce Co., a Missouri corporation,	*	
Appellee.	*	

No. 89-1928

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,	*	
Appellants,	*	Appeals from the United States District Court for the Eastern District of Missouri.
v.	*	

Walter A. Rubin, d/b/a M.J.M. Produce Exchange,

Appellee.

No. 89-1929

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Sugar Ripe Banana Company,

Appellee.

No. 89-1933

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

N. E. Friedmeyer-Sellmeyer, Distributing Company,

Appellee.

No. 89-1934

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Salvatore Pupillo, d/b/a Pupillo Fruit Company,

Appellee.

No. 89-1935

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

George A. Heimos Produce Company, Inc.,

Appellee.

No. 89-1936

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

William Mantia Fruit Company, Inc.,

Appellee.

No. 89-1937

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

St. Louis Banana and Tomato Company, Inc.,

Appellee.

No. 89-2204

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Lamperson Fruit & Produce Company,

Appellee.

No. 89-2205

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Lombardo Fruit and Produce Company,

Appellee.

No. 89-2206

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

John Moon Produce Company,

Appellee.

No. 89-2207

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Stanley Produce, Inc.,

Appellee.

No. 89-2208

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Robert Johnson, d/b/a J. Johnson, Fruit & Produce Company,

Appellee.

No. 89-2209

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Adolph A. Solomon and Irl S. Solomon, statutory trustees for Adolph & Ceresia Produce Co.,

Appellees.

No. 89-2210

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

United Fruit & Produce Company,

Appellee.

No. 89-2438

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Goldman Fruit & Produce Co., Inc.,

Appellee.

No. 90-1160

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Jules J. Schwartz and Joseph F. Schwartz, d/b/a New Market Produce Company,

Appellees.

No. 90-1161

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Franklin Produce Company, a Missouri Corporation,

Appellee.

No. 90-1162

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellants,

v.

Marske Produce Company, Inc.,

Appellee.

No. 89-2839

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellee,

v.

George A. Heimos Produce Co., Inc.,

Appellant.

No. 89-2840

Central States, Southeast and Southwest Areas Pension Fund, and Howard McDougall, Trustee,

Appellee,

v.

N. E. Friedmeyer-Sellmeyer Distributing Company,

Appellant.

Submitted: September 10, 1990

Filed: December 6, 1990

Before FAGG and BEAM, Circuit Judges and WOODS,* District Judge.

BEAM, Circuit Judge.

In this consolidated appeal, Central States, Southeast and Southwest Areas Pension Fund (Central States) appeals from judgments entered in favor of defendants-employers. Pursuant to sections 502 and 515 of the Employee Retirement Income Security Act, 29 U.S.C. §§1132, 1145 (1988), Central States brought separate actions against more than twenty independent produce wholesalers to collect delinquent

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* The HONORABLE HENRY WOODS, United States District Judge for the Eastern District of Arkansas, sitting by designation.

pension contributions. Central States contended that the produce companies failed to make pension contributions on behalf of certain employees as required by the governing collective bargaining agreements. Central States argued that these employees, whose questionable status was discovered in an audit, were regular employees for whom contributions were due. The employers, however, classified these employees as "casuals" for whom contributions were not required by the collective bargaining agreements. The district court found that the collective bargaining agreements were ambiguous and looked to the intent and past practice of the parties to define "casual employee." The district court held that a "casual employee" is not necessarily a person who works only intermittently or sporadically, as Central States thought, but, instead,

includes those employees so designated by the employer, with the consent of the union, regardless of their work schedules. Accordingly, the district court found no contributions owing and entered judgment for defendants. We reverse.1/

1/ We have added to this consolidated appeal on the merits the consolidated appeal of George A. Heimos Produce Company and N.E. Friedmeyer-Sellmeyer Distributing Company, Nos. 89-2839 and 89-2840, which seek reversal of the district court's denial of their request for attorneys' fees. In its order of October 6, 1989, the district court held that the employers were not entitled to attorneys' fees because "there is no evidence of bad faith on the part of plaintiffs and plaintiffs' legal position was not frivolous." Given that we reverse on the merits, the district court clearly did not abuse its discretion in so ruling, and no separate opinion in the attorneys' fees appeal is warranted.

I. BACKGROUND

Due to their physical proximity on several city blocks in St. Louis, the defendants-employers in these cases, members of the St. Louis Fruit and Produce Association, are collectively known as Produce Row. Most are independently owned, family-run companies, wholesaling fresh fruits and vegetables to small, independent grocers. Central States is an employee benefit fund as defined by ERISA. See 29 U.S.C. §1002. Central States, which is headquartered in Chicago, receives more than 5,000 collective bargaining agreements for review each year, covering more than 250,000 active participants and 125,000 retired participants. In this case, contributions to the pension fund are governed by collective bargaining agreements negotiated by the employers

and Local 688 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

The collective bargaining agreements at issue cover the years 1973 through 1988 and are dated 1973, 1976, 1979, 1982 and 1985. Because they contain similar provisions on casual employees, the agreements dated before 1982 can be conveniently considered together. The pre-1982 agreements provide in Article IX that casual employees are to be hired subject to need, that their hiring cannot increase "the normal then existing number of working employees," that casuals cannot work more than eighty hours per month, and that casuals are to be used as replacements for regular employees. Article IX was renegotiated in 1982 so that many of these restrictions on the use of casuals were eliminated. Generally, however,

all relevant agreements provide that casual employees receive neither fringe benefits nor seniority. At issue is not whether casuals are entitled to benefits, but, rather, which employees are casuals.

The dispute over the meaning of "casual employee" arose from a random audit in October 1983 of Lamperson Fruit and Produce Company. As a result of the audit, which covered September 28, 1980, to September 24, 1983, Central States claimed that Lamperson owed $73,034 for "'non-reporting of eligible Plan Participants.'" Central States, Southeast & Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distrib. Co., No. 84-1669 C (5), slip op. at 6 (E.D. Mo. Apr. 28, 1989). In its audit, Central States discovered employees who worked more or less full-time during the

audit period but whom Lamperson classified as casuals. Because it understood casuals to be employees who worked only sporadically or intermittently as needed, Central States contended that these employees were regulars for whom contributions were due. In the resulting action to collect delinquent contributions, Central States requested audits of the Produce Row employers.

On January 16, 1985, the Chief Judge of the Eastern District of Missouri designated the case against Friedmeyer-Sellmeyer Distributing Company as "the most suitable case to try, brief and decide as a guide in the ultimate trying, briefing and decision

in all of the above cases."[2/] Appellants' App. at 255. On January 12, 1987, the district court ordered defendant Friedmeyer-Sellmeyer to submit to an audit of its personnel records from December 28, 1980, to December 31, 1983. Central States, Southeast & Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distrib. Co., 650 F. Supp. 978, 980 (E.D. Mo. 1987). The audit was later expanded to cover the years 1979 to 1986. It revealed seven employees who worked essentially full-time for some if not all of the audit period. "[T]he audit report . . . revealed that six of the seven employees

---

2/ The cases were originally assigned to four judges in the Eastern District of Missouri. Following entry of judgment in the Friedmeyer-Sellmeyer case, judgments for defendant-employers were entered in the other pending cases. This consolidated appeal follows.

included in the report worked virtually every week for over one year and one of these individuals worked all but two weeks during a period of nearly six years." Brief for Appellant at 16. William Kauck, who conducted the audit of Friedmeyer-Sellmeyer, testified that the audit revealed "an inordinate use of what the employer was calling 'casual employees.'" Trial Transcript vol. 1, at 127. As a result of the audit, Central States claimed that Friedmeyer-Sellmeyer owed $24,774 in delinquent contributions.

At the bench trial, Friedmeyer-Sellmeyer contended that its use of casual employees was consistent with the collective bargaining agreements, that no dispute or misunderstanding about casuals existed between the employer and the union, that

none of the casuals were confused about their status as casuals, and that the only party complaining was Central States. The evidence established that it was standard practice for the Produce Row employers to initially hire all employees as casuals, some of whom might laster become regulars upon a vacancy. Trial Transcript vol. 2, 67, 80, 147, 214. Several witnesses testified that the casuals knew of their status when hired, id. at 99, 116, 163, and that no one "other than Central States ever questioned which employees were casuals versus regulars." Id. at 163. Casuals were casuals merely because they were hired as casuals and because they received no benefits. Id. at 62, 64, 199.

The evidence is also clear, however, that casuals did the same work as

regulars and in some cases worked as many hours as regulars. The testimony of Douglas Brand, the secretary-treasurer of United Fruit and Produce Company, is typical:

> Q: Do they have the same hours at work?
>
> A: They may.
>
> Q: They work full time?
>
> A: They may.
>
> Q. Any difference in the hours of a casual or regular?
>
> A: Not that I know of.

Id. at 109. Central States argued to the district court that these facts

proved its case: that given the standard meaning of "casual employee" -- someone who works sporadically or intermittently as needed -- used in the collective bargaining agreement, those employees denominated casuals who worked as many hours as regular employees for a year or more were in fact regular employees.

The district court disagreed with Central States that the term "casual employee" in the collective bargaining agreement meant only those employees who worked sporadically or intermittently. Rather, the district court found the contract term to be ambiguous, and, after examining past hiring practices on Produce Row, held that the collective bargaining agreements had not been violated. "Quite simply, the Produce Row employers acted exactly as they

agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees." Friedmeyer-Sellmeyer, slip op. at 10. In essence, the district court held that by "casual employee" the collective bargaining agreement meant whomever the employer so designated. This appeal concerns the correctness of that decision in the context of ERISA.

II. DISCUSSION

Central States brought these actions pursuant to section 515 of ERISA, which provides that:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the

> terms and conditions of such plan or such agreement.

29 U.S.C. §1145. It is clear that this section "creates a federal right of action independent of the contract on which the duty to contribute is based." Bituminous Coal Operators' Ass'n v. Connors, 867 F.2d 625, 633 (D.C. Cir. 1989). It is equally clear that Congress intended that this section would simplify actions to collect delinquent contributions, avoid costly litigation, and enhance the actuarial planning necessary to the administration of multiemployer pension plans. See, e.g., Central States, Southeast & Southwest Areas Pension Fund v. Gerber Truck Serv., 870 F.2d 1148, 1152 (7th Cir. 1989).

Prior to the enactment of section 515 in 1980, collection actions brought

by plan trustees were often converted into complex and costly litigation involving various contract formation defenses. Id. at 1152-53. Collection actions result in lower benefits and higher contributions rates not only because of this cost, but also because any shortfalls in contributions skewer the pension fund's actuarial planning.

> The actuarial calculations that produce the contribution and payout systems are based on the supposition that the funds will receive full contributions on behalf of all employees covered. If a local union and an employer try to shrink the duty to contribute without notice to the funds and a contraction of the funds' obligations, the fund may end up paying benefits without corresponding contributions.

Robbins v. Lynch, 836 F.2d 330, 333 (7th Cir. 1988).[3/] See also Central States, Southeast & Southwest Areas Pension Fund v. Behnke, Inc., 883 F.2d 454, 460 (6th Cir. 1989); Gerber, 870 F.2d at 1154-55; Connors, 867 F.2d at 633. Central States claims, for precisely these reasons, that it would not have accepted the plans from Produce Row for participation had it known of the

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3/ The importance of this rationale does not depend on whether any of those employees whom Central States regards as regulars, but whom the employers regard as casuals, actually files a claim against Central States for benefits. "[P]ension and welfare plans are insurance vehicles. Insurers depend on receiving contributions from persons who collect far in the future or not at all." Gerber, 870 F.2d at 1154. What matters is not whether the employees at issue ever attempt to collect, but that without contributions from those whom Central States claims are regulars according to the terms of the collective bargaining agreement, its actuarial assumptions are unsound. See id.

employers' definition of "casual employee." "Because of the actuarial detriment inherent in arrangements that limit contributions to only those employees that are likely to receive benefits, the Pension Fund prohibits the participation of employers who split the bargaining unit for the purpose of pension coverage." Brief for Appellant at 26.[4]

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[4] Casuals were not union members until 1982. Trial Transcript vol. 2, 71, 117. Indeed, casuals were distinquishable from union employees in part because they did not wear union buttons. Id. at 63. Nevertheless, the parties seemed to agree at oral argument that casuals were part of the bargaining unit and that the union acquiesced in their exclusion from pension benefits. The district court rejected any argument based on splitting the bargaining unit, and no such argument has been made on appeal.

Section 515 deals with these concerns by placing a pension fund in a better position than that which it would otherwise occupy in relation to the collective bargaining agreement. Because a pension fund is not a party to the collective bargaining agreement, it would normally be a third party beneficiary of it. Behnke, 883 F.2d at 460; Connors, 867 F.2d at 632; Robbins, 836 F.2d at 333; Southwest Adm'rs, Inc. v. Rozay's Transfer, 791 F.2d 769, 773 (9th Cir. 1986), cert. denied, 479 U.S. 1065 (1987). As a third party beneficiary, however, the pension fund would be subject to "any contract defense which the promisor could assert against the promisee if the promisee were suing on the contract." Rozay's Transfer, 791 F.2d at 773. It is these contract defenses--for example, fraud in the inducement, oral side agreements or

course of performance--that are most likely to breed litigation. Gerber, 870 F.2d at 1154. As a result, the courts find that section 515 places the pension fund in a better position, analogous to that of a holder in due course or a receiver of a failed bank--"entitled to enforce the writing without regard to understandings or defenses applicable to the original parties." Id. at 1149. See also Benson v. Brower's Moving & Storage, 907 F.2d 310, 314 (2d Cir. 1990); petition for cert. filed, 59 U.S.L.W. 3278 (Sept. 26, 1990); Robbins, 836 F.2d at 333; Rozay's Transfer, 791 F.2d at 773. "If it means nothing else, section 515 means that . . . suit [by a trustee] cannot be thwarted by defenses not apparent from the face of the Agreement." Connors, 867 F.2d at 634. The courts of appeals have been unanimous in so holding. See, e.g.,

Berry v. Garza, No. 89-1651, slip op. at 4-5 (8th Cir. Nov. 15, 1990) (rejecting defense based on lack of majority status); Benson, 907 F.2d at 314-15 (rejecting defenses of abandonment of contract and lack of majority representation); Gerber, 870 F.2d at 1150-51 (rejecting defense based on oral agreement between the parties not to enforce the written terms of the collective bargaining agreement as to some employees); Robbins, 836 F.2d at 333-34 (rejecting as defense claim that union had agreed not to collect a payment called for by the agreement); Rozay's Transfer, 791 F.2d at 775 (rejecting claim that promise to make contributions was fraudulently induced); Southern California Retail Clerks Union & Food Employers Joint Pension Trust Fund v. Bjorklund, 728 F.2d 1262, 1265-66 (9th Cir. 1984) (same). In sum,

the courts recognize only two defenses to a collection action: that the pension contributions are themselves illegal or that the collective bargaining agreement is void. Benson, 907 F.2d at 314.

Through section 515, Congress has decided that a pension fund is entitled to "assume that all participants in a plan are following the stated terms; no other approach permits accurate actuarial computations and proper decisions about which claims to pay." Robbins, 836 F.2d at 333 (emphasis added). Thus, whether the employer and union agree in this case that they knew what they meant by "casual employee" is irrelevant if the written agreement unambiguously expresses something other than what they intended. Absent ambiguity in the written agreement, the

claims of the Produce Row employers are little different from a side agreement made with the union not to disclose their true intention to the pension plan. Absent ambiguity, it is clear that the employers in this case do not assert a defense apparent from the face of the agreements.

The district court considered the provisions of four collective bargaining agreements, from 1973, 1976, 1979 and 1982. Because the three agreements prior to the 1982 agreement contain similar provisions pertaining to casual employees, the district court referred only to the 1979 and the 1982 agreements. Casual employees are covered in Article IX of the 1979 agreement, which provides:

> Employer may hire, subject to need, persons who will be known as "casual

> employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.
>
> 2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.
>
> . . . .
>
> 4. Fringe benefits shall not be paid on account of casuals . . . and no seniority shall be acquired by such casuals.
>
> . . . .
>
> 6. Casuals may be used to replace regular employees who are absent for any reason . . . provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists.

Article IX was changed in the 1982 collective bargaining agreement by eliminating several of the restrictions on the use of casual employees. It still provides that "the Employer may

hire, subject to need, persons who will be known as 'casual employees' (casuals)." Similarly, it still provides that casual employees are not entitled to fringe benefits, although it does provide for a separate seniority list for casuals. The provisions restricting hours and hiring such that the "normal then existing number of working employees" is not thereby increased, however, are absent.

Without reference to these differences between the pre-1982 and 1982 agreements, the district court found that "casual employees are specifically defined in the CBAs." Friedmeyer-Sellmeyer, slip op. at 4. Despite its reference to the specific definition, however, the district court found that "[t]he use of the term 'casual employee' in these agreements

creates an ambiguity that requires the Court to apply . . . rules of construction." Id. at 8-9. We disagree that any of the agreements are ambiguous.

As with any contract, whether a collective bargaining agreement is ambiguous is a question of law subject to de novo review. Ehrhardt v. Penn Mut. Life Ins. Co., 902 F.2d 664, 667 (8th Cir. 1990), cert. denied, 111 S. Ct. 152 (1990); Lehman Bros. Kuhn Loeb v. Clark Oil & Ref., 739 F.2d 1313, 1317 (8th Cir. 1984), cert. denied, 469 U.S. 1158 (1985). The law is clearly established in this circuit that a contract is ambiguous only if it is reasonably susceptible of more than one construction. Ehrhardt, 902 F.2d at 667; Lehman Bros. 739 F.2d at 1317; Universal Towing Co. v. United Barge Co., 579 F.2d 1098, 1101 (8th Cir.

1978). In ascertaining whether a contract is reasonably susceptible of more than one construction, words are to be given their plain and ordinary meaning as understood by a reasonable, average person. NLRB v. Superior Forwarding, Inc., 762 F.2d 695, 697 (8th Cir. 1985); Lehman Bros., 739 F.2d at 1317; Universal Towing, 579 F.2d at 1101. Recourse to the ordinary, dictionary definition of words is not only reasonable, but may be necessary. See Conoco v. Norwest Bank, 767 F.2d 470, 471 (8th Cir. 1985).

Given that the provisions on casual employees in the pre-1982 agreements differ from those in the 1982 agreement, we must consider the agreements separately. Beginning with the pre-1982 agreements, we find no ambiguity. The dictionary contains a standard definition of "casual employment:"

> Employment at uncertain or irregular times. Employment for short time and limited and temporary purpose. Occasional, irregular or incidental employment. Such employee does not normally receive seniority rights nor does he normally receive fringe benefits.

Black's Law Dictionary 198 (5th ed. 1979). The auditors for Central States who testified before the district court said that their understanding of "casual employee" was consistent with this definition. Joel Ahrens testified that "[w]e have an understanding or we use an assumption, I guess you would call it, in -- for casual employees, we assume that a casual employee is not an employee who is going to work with any great regularity." Trial Transcript vol. 1, at 52-53. William Kauck also testified that he had a general understanding that a "casual employee" worked on a sporadic or infrequent

basis, id. at 139, and that his understanding was consistent with the Central States field audit manual. Id. at 147-48. Ahrens further testified that Central States had a general understanding of "casual," id. at 64, and contrasted the employers' use of "casual" with a contract provision providing that people labeled "blue hats" would not receive pension benefits but all other employees would. Ahrens said that in that instance, "[w]e would want to know what a 'blue hat' is. I don't know what a 'blue hat' is." Id. at 63. By implication, Ahrens suggested that if the employers meant by "casual employee" something other than its dictionary definition -- indeed, something contrary to its dictionary definition -- they could have said so. Central States merely presumed that

"casual employee" was used consistently with its dictionary definition.

The record makes clear that Central States thought it knew what the employers meant by "casual employee" because of that term's common meaning. It is also clear that Central States thought the restrictive provisions dealing with casuals contained in the pre-1982 agreements confirmed its understanding. We agree that the restrictive provisions in the 1979 agreement are consistent with the dictionary definition of "casual employee." Kauck testified that he understood the language "subject to need" in Article IX, section 2 and the limitation found in subsection 1, that "casuals may be hired where the normal then existing number of working employees is not thereby increased," to

be consistent with his understanding that casuals worked sporadically as needed or as replacements. With reference to subsection 1, Kauck testified that "this particular provision says that -- actually a casual can be used on a replacement basis. In other words, a regular employee can be off; they hire a casual employee to take his place for that time that he's off. And the normal then existing number of employees isn't increased." Id. at 141. Similarly, we think that the limitation on the number of hours to be worked by casuals found in subsection 2, and the provision in subsection 6 that casuals are to replace regular employees when absent, also support the standard meaning of "casual employee." Contrary to the assertion of the employers that "casual employee" is not defined in any of the agreements but is merely subject

to various conditions, we think that these conditions help to define the term and do so consistently with the dictionary definition. From the face of the written documents, the pre-1982 agreements are not ambiguous.

It is also clear from the record before the district court that the hiring practices of Produce Row employers did not conform to this unambiguous definition in the pre-1982 agreements. As indicated, several witnesses for the employers testified that it was standard practice to hire all employees as casuals; only some would later become regulars. As for the restrictions in the pre-1982 agreements, the witnesses testified that the agreements were simply ignored. Brand testified that the practice of United Fruit and Produce under the 1979

agreement was to hire casuals even when that hiring increased the number of then existing working employees. Trial Transcript vol. 2, at 129-30. When asked whether be thought that such a practice violated the agreement, he agreed: "If you want to use what's on the paper here, yes." Id. at 130. Vincent Vogler, the lawyer who represented the employers in the negotiations culminating in the 1982 agreement, testified that the employers in 1979 had no idea what section two of Article IX meant. Id. at 208. He testified that subparagraph 1 "was not followed in past practices down there," and "was being totally ignored." Id. The hour limitation in subparagraph 2 was similarly ignored, id. at 209, as was subparagraph 6. "The facts are the past practices indicate that that formula and that procedure just wasn't

going on." Id. at 215-16. Thus, not only were the pre-1982 agreements unambiguous, their terms were also ignored. The employers contend, however, that this evidence proves that the pre-1982 agreements did not reflect their actual intent, which is made clear by the changes in the 1982 agreement.5/

5/ The district court agreed with this argument. While acknowledging that some of the provisions in the pre-1982 agreements were not followed, Friedmeyer-Sellmeyer, slip op. at 9, the court suggested that they were "merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed." Id. Hence, the court agreed with the employers that the 1982 agreement was merely "corrected" to reflect "the clear intention of the parties to the bargaining agreement." Id. As indicated below, we think that this analysis ignores both the purpose of written agreements and section 515.

This argument, however, has little to do with whether the written agreement is unambiguous. Given the dictionary definition of "casual employment," we disagree that the 1982 collective bargaining agreement was ambiguous. Even though several of the restrictions found in the 1979 agreement were deleted from the 1982 agreement, the parties retained the term "casual employee." In effect, they argue that by removing these restrictions from the 1982 agreement they gave a term a meaning contrary to its dictionary definition, and that they were not obligated to say so. Agreements are written purposely to avoid such a situation. "While interpreting contract language is not always easy, sticking to the words the parties actually used limits substantially the bounds of legitimate disagreement." Morta v. Korea Ins.

Corp., 840 F.2d 1452, 1459 (9th Cir. 1988). Were parties to a contract able to alter the usual definition of an unambiguous, written term by reference to their past practices or their own private agreement, reason could not justify the written word.

In essence, the employers argue that "casual employee" means anyone so intended by the employer and the union, even if contrary to the plain meaning of "casual employee" in the written agreement. In TKO Equip. Co. v. C & G Coal Co., 863 F.2d 541 (7th Cir. 1988), the Seventh Circuit considered a situation in which a security agreement was written as a lease but contended by the parties to be a sale. The court held that if the parties meant for their agreement to be a sale, they should have said so.

> If [the parties] wish the symbols "one Caterpillar D9G tractor" to mean "500 railroad cars full of watermelons", that's fine -- provided parties share this weird meaning. A meaning held by one party only may not be invoked to change the ordinary denotation of a word, however. Intent must be mutual to be effective; unilateral intent does not count. Still less may the parties announce that they "share" an unusual meaning to the detriment of strangers, who have no way of finding out what was in the contracting parties' heads.

Id. at 545 (citation omitted). The employers in this case argue the contrary, that Central States is merely attempting to ascribe to "casual employee" its own meaning, not the meaning intended by the union and the employers, and that Central States cannot do this. "Central States does not have the right to pull up a chair to the bargaining table, long after the bargain has been struck, and tell the employer that the agreement he signed

years ago means something other than that which the employer and union intended." Brief for Appellee at 23. Section 515, however, requires that what the parties to the bargaining agreement intended must be made clear from its face.

That intention was not clear in this case, and the testimony at trial confirms that the employers knew both that the meaning they attached to "casual employee" in the written agreements was unusual, and that Central States could not ascertain their meaning from the documents. When asked how a third party like Central States would be able to ascertain the status of casual employees under the 1979 agreement, Charles Gallagher, president of United Fruit and Produce Company, responded, "I couldn't tell you how they go to

ascertain them." Trial Transcript vol. 2, at 90. While Vincent Vogler suggested that the parties had defined casuals by exclusion, i.e. a casual is anyone not a regular, id. at 226, Douglas Brand acknowledged that no definition of "regular employee" exists in the agreements. Id. at 150. More emphatically, however, Brand went on to acknowledge that the parties gave to "casual employee" an unusual meaning.

> Q: [W]hat you're telling me is that you use the English language other than in the standard form.
>
> A: In our case, yes.
>
> Q: You had unique -- you used words like "casual" and gave it a unique definition; isn't that true?
>
> A: We didn't give a unique definition. Our term, "casual," means something similar to laborer. This

> contract was bought from an existing contract many, many years ago that had the word "casual" in it. The word "casual" in our business does not fit the word "casual" in your terms.
>
> . . . .
>
> Q: My question is, you have used the word "casual" in a unique manner, isn't that true?
>
> A. Yes.

Id. at 151-52. Moreover, Brand was aware that Central States was not told of this unusual meaning given to "casual employee."

> Q: You didn't tell Central States, did you, in the contract that you were using these words in a unique manner?
>
> . . . .
>
> A: I assumed when we sent you people the contract that they read it and that if they had any question about what this means, they would ask. And if they don't ask, they accept it.

Id. at 153.

Clearly, the union and the employers attached to "casual employees" a meaning different from its plain meaning and yet did not tell Central States of their intention. For purposes of ERISA, such conduct is no different from when parties orally agree to ignore the unambiguous terms of a written agreement. As indicated, section 515 was intended to preclude such a defense. Gerber, 870 F.2d at 1153. Whatever their intent, given an unambiguous agreement, the parties must follow its terms when dealing with the pension plan.

III. CONCLUSION

The employers in this case argue that the agreements at issue were ambiguous, but not because of any misunderstanding between the parties to the contract. Given the purpose of written contracts and section 515 of ERISA, the parties to a collective bargaining agreement are bound by the terms of their agreement, regardless of their undisclosed intent. By so holding, we merely reaffirm a basic rule of contract interpretation. "A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared." Robbins, 836 F.2d at 332. Section 515 of ERISA emphasizes that this is especially true as to third

parties obligated to administer a pension fund according to the terms of written agreements. The judgment of the district court is reversed and this matter is remanded for proceedings consistent with this opinion. Given our decision on the merits, the judgment of the district court denying the employers' request for attorneys' fees is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1669 C (5)
vs.	)	
N.E. FRIEDMEYER-SELLMEYER DISTRIBUTING COMPANY,	)	
Defendant.	)	

MEMORANDUM

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall brought suit against N.E. Friedmeyer-Sellmeyer Distributing Company (Friedmeyer) and approximately 22 separate produce companies, all members of the St. Louis Fruit and Produce Association. Plaintiffs seek employer contributions on behalf of "casual employees," the definition of which is the essential issue in these

cases. This Memorandum constitutes the Court's findings of fact and conclusions of law for the purpose of Fed.R.Civ.P. 52(a).

I. Motions in Limine.

Prior to trial, both parties filed motions in limine, which the Court took with the case. The Court will address these motions prior to making its findings of fact and conclusions of law.

Defendant filed a motion to exclude the testimony of plaintiffs' expert witness, Professor Neil Bernstein. Defendant contends that Bernstein's application of labor law to the facts in this case is not proper testimony for an expert witness. Plaintiffs argue that the Court has the discretion to admit expert testimony bearing on the ultimate issues of the case.

Fed.R.Evid. 704 provides that an expert's testimony is not objectionable

merely because it embraces an ultimate issue to be decided by the trier of fact. This does not mean that all expert testimony is admissible. The Notes of the Advisory Committee to that rule explain that the opinion still must meet the standard set forth in Rule 702 that the testimony of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue."

There is no dispute that Professor Bernstein's credentials are substantial. Nevertheless, the Court cannot permit expert testimony on the ultimate legal issues to be determined by the Court. To allow such testimony would set a dangerous precedent that does little more than delegate the Court's duties to legal scholars. The Court will sustain defendant's motion and will exclude the testimony of Professor Bernstein in makings its decision in this case.

Plaintiffs filed three motions in limine. Plaintiffs' first motion addresses two issues: first, any oral agreement or understanding between Local 688 and the Produce Row companies concerning the payment of pension fund contributions for casual employees; and second, any understanding, practice or custom of dealing concerning casual employees between the Produce Row companies and Local 688. This motion goes to the crux of the issue in this case -- whether the Court may consider Friedmeyer's past practices in determining whether it now must contribute to the Pension Fund for casual employees. Because this motion goes to the ultimate issue before the Court, it will be addressed in the Court's conclusions of law.

In plaintiffs' second motion in limine, it contends that reports of

investigations by or proceedings before the National Labor Relations Board (NLRB) should be excluded from evidence. Plaintiffs' motion concerns an investigation made by the NLRB after a grievance was filed by Lon Jamison, an employee of M. Rizzo and Company, another Produce Row Company. The grievance was filed against M. Rizzo and Local 688, charging them with unfair labor practices. Similar grievances were filed by Mark Kerperion and Darell Chamberlain against George A. Heimos Produce Company and Local 688.

At trial, defendant introduced and the Court received into evidence, subject to plaintiffs' objection, defendant's exhibit Q, which is a letter to Kerperion from the NLRB. After an investigation, the NLRB determined that it would not issue a complaint in Kerperion's case. Defendant did not introduce any evidence

relating to the complaint Jamison filed with the NLRB.

Plaintiffs' argument against admission of the NLRB report would require a finding by the Court that the report lacks trustworthiness, and therefore would be inadmissible heresay. **See** Fed.R.Evid. 803(8)(C). Despite plaintiffs' contention, there is nothing about the report that indicates that it is not trustworthy. The Court will deny plaintiff's motion in limine.

Plaintiffs' third motion in limine seeks to exclude Vincent T. Vogler as a witness, or in the alternative, to disqualify him as counsel for defendant. In defendant's pretrial compliance, Vogler was listed as a witness defendant "will call." Plaintiffs listed Vogler in their pretrial compliance as a witness they "may call." On May 9, 1988, the first day of trial, Vogler withdrew as

counsel for defendant, and later testified on behalf of defendant. In light of Vogler's withdrawal as counsel for defendant, the Court will deny plaintiffs' third motion in limine.

II. Findings of Fact.

At the time of trial the parties filed a joint stipulation of findings of fact, leaving few factual issues in dispute. The Central States Pension Fund is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1002 **et seq**. Contributions to the Pension Fund are governed by certain Collective Bargaining Agreements (CBAs) entered into between the St. Louis Fruit and Produce Association (on behalf of defendant and other Produce Row companies) and Teamsters Local Union No. 688, affiliated with the

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Collective Bargaining Agreements were executed in 1973, 1976, 1979 and 1982, each covering a three-year period.[1] Each CBA defined "employee" as follows in Article I, Section I:

> The term "Employee" as used in this Agreement shall include all employees engaged in the handling of merchandise in the shipping, receiving, storing and warehousing thereof including maintenance department employees, INCLUDING, but not by way of limitation, SUPERINTENDENTS, OFFICE AND CLERICAL EMPLOYEES.

Beyond this definition, employees are divided into three groups: regular, probationary and casual employees. Only probationary and casual employees are

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1 Plaintiffs filed this action on July 18, 1984, during the time the 1982 CBA was in effect. The 1985 CBA, which was nearly identical to the 1982 CBA, was in effect at the time this case was tried in May 1988.

specifically defined in the CBAs. The 1973, 1976 and 1979 CBAs defined probationary and casual employees in Article IX as follows:

> Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.
>
> Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of

working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason....

> 7. Uniform absentee records to be kept daily with amount of casual hours used.
>
> 8. When opening [sic] for regular employee occur, casuals working at that Company at that time, will be considered first for said opening before hiring from the outside, if they qualify.

The definitions of probationary and casual employees were changed in the 1982 CBA. Article IX, Section 1 provided that new employees would be on probation for a period of 60 days, and Section 2 eliminated the provision that casual employees could work a cumulative maximum of 80 hours during any calendar month. Finally, under the 1982 CBA, a seniority list was established for casual employees and they were given four paid holidays each year. These same provisions were also contained in the 1985 CBA.

The Produce Row employers also executed documents called pension

agreements that outlined the rates of the employers' pension contributions. The agreements also provided that the employers and the union would be bound by all the rules and regulations of the Central States Trust Agreement. The trust agreement requires the employers to make contributions in accordance with the collective bargaining agreements. Thus, the different agreements have gone full circle, requiring the Court to determine whether defendant and the other Produce Row employers have made pension fund contributions as required by the CBAs.

Historically, employees in the produce business hired two groups of employees -- those who received fringe benefits and those who did not. In recent years, the terms "regular employees" and "casual employees" have become associated with those two groups. Casual employees traditionally were hired to supplement

the work force during the peak periods, especially during the summer and Thanksgiving and Christmas holidays. Casuals also were used to replace employees who were not working due to vacation or sickness.

In addition to compensating regular employees with fringe benefits, the practice among Produce Row employers has been to pay regulars at a higher hourly rate than casual employees. On the job, regular employees could be distinguished from casuals by the different time cards they used and the union pins they wore. Until 1982, casual employees were not members of the union, and paid no union dues. Since 1982, they have received limited union benefits, including several paid holidays each year and recognition of seniority.

As beneficiaries of pension fund contributions, plaintiffs regularly

conduct audits of participating employers to determine compliance with collective bargaining agreements. Lamperson Fruit and Produce Company was selected at random for an audit by plaintiffs in October 1983. The Lamperson audit covered the period from September 28, 1980 to September 24, 1983. After the audit, James Dodd, Lamperson's owner, was informed that Lamperson owed $73,034.00 plus interest for "non-reporting of eligible Plan Participants." In the February 3, 1984 letter, plaintiffs' auditor concluded that Lamperson should make pension contributions for all employees who perform the same duties:

> The Fund's interpretation is that employees working consistently and performing the same duties as regular employees should not be classified as casual, but should be considered regular and eligible for pension contributions after they have completed their probationary period.

After the Lamperson audit, it became apparent to plaintiffs that it was the practice on Produce Row to hire casual employees who, in some cases, performed the same work as regular employees. Plaintiffs sought to conduct similar audits of Friedmeyer and other Produce Row employers. The employers refused to comply with the requests, and plaintiffs commenced separate actions against each of the Produce Row employers. On January 12, 1987, the Court ordered defendant to submit to an audit of its personnel records by plaintiffs for the purpose of determining whether defendant had complied with the provisions of the collective bargaining and trust agreements between the two parties between December 28, 1980 and December 31, 1983. **See Central States, Southeast and Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distr. Co.**, 650 F.Supp. 978, 980 (E.D.Mo. 1987).

Following the audit, plaintiffs calculated the amount they believed Friedmeyer owed the pension fund for persons classified as casual employees, but who were performing the same work as regular employees. Plaintiffs' Exhibit 41 showed an adjustment of $39,073.00. This exhibit was corrected by Plaintiffs' Exhibit 62, which omitted two employees who were not covered by the CBA. Exhibit 62 shows a corrected balance due from Friedmeyer of $24,774.00. Plaintiffs now seek to collect those funds.

III. Conclusions of Law.

The Court has subject matter jurisdiction pursuant to § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a); § 502 of ERISA, 29 U.S.C. § 1132; and 28 U.S.C. § 1331.

Central States was not a party to the collective bargaining agreement between

the Produce Row employers and the union. Rather, the pension fund is a third-party beneficiary of the collective bargaining agreement, **Robbins v. Lynch**, 836 F.2d 330, 333 (7th Cir. 1988), and is entitled to maintain an action to collect unpaid pension contributions under ERISA § 502. To aid employers and fund trustees with the collection of delinquent contributions, Congress enacted § 515 of ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions on such agreement.

Fund trustees are given broad authority in actions to collect overdue contributions because the class of potential beneficiaries includes all

employees who were covered employees within the meaning of a collective bargaining agreement, not just those employees for whom pension contributions were made.

The interpretation of a collective bargaining agreement is a question of law to be resolved by the Court by applying federal law principles. **Walsh v. Schlecht**, 429 U.S. 401, 407 (1977); **Abbate v. Browning-Ferris Industries**, 767 F.2d 52, 55-56 (3d Cir.1985). These principles must be fashioned from the policy of our national labor laws. **Id.** at 56 (quoting **Textile Workers Union v. Lincoln Mills**, 353 U.S. 448, 458 (1957)).

Where there is an ambiguity in a collective bargaining agreement, normal common law rules of construction do not apply. In **Transportation Communication Employees Union v. Union Pacific R.R. Co.**, 385 U.S. 157 (1966), the Supreme

Court stated, "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Id. at 161. See also Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987)(interpretation of ambiguous term "depends on the parties' intent at the time of the contract's execution, in light of earlier negotiations, later conduct, related agreements and industrywide custom"). The use of extrinsic evidence to interpret an ambiguity must not be confused with the oral modification of a collective bargaining agreement, which is not enforceable. See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No.

87-2480, slip op. at 2 n.1 (7th Cir. March 17, 1989); **Operating Engineers Pension Trust v. Beck Engineering**, 746 F.2d 557, 568-69 (9th Cir. 1984).

Plaintiffs contend defendant is liable for pension fund contributions under five consecutive collective bargaining agreements covering the period from 1973 to 1988. The use of the term "casual employee" in these agreements creates an ambiguity that requires the Court to apply the rules of construction outlined above. The long-standing practice on Produce Row has been to hire certain persons who do not work as regular employees. Generally, casual employees were hired as extras during the peak periods or to fill in for regular employees who were sick or on vacation. It is not disputed that on some occasions casuals would work as much as regulars, but this is to be expected in an industry

where the workload is irregular and unpredictable.

Each of the CBAs between the Produce Row employers and the union reflects the practice of hiring casual employees who, because of their temporary status, do not receive the same wages, benefits or job security as regular employees. Although the 1973, 1976 and 1979 CBAs limited casuals to working 80 hours per month, neither the employees, Produce Row employers or the union adhered to this limit during the period covered by the agreements. Rather, it appears that this provision was merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed.

The employers and union "corrected" the 80-hour rule in the 1982 CBA, when the limitation was eliminated. There is

no explanation why it took so long to conform the CBA to the practice and intention of the employers and union. Regardless of the reason, the change reflects the clear intention of the parties to the bargaining agreement that casual employees not be limited to working 80 hours per month. This history is helpful in defining the term "casual employees" as used in the collective bargaining agreements.

Plaintiffs suggest that the Produce Row employers and the local union orally modified the CBAs to the detriment of Central States and future claimants. The Court does not believe the cases cited by plaintiffs support this contention. The typical case plaintiffs cite involved the collection of pension fund contributions for persons who were covered by a CBA, but on whose behalf no contributions had been made. For example, in **Central**

States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No. 87-2480, slip op. (7th Cir. March 17, 1989), Gerber agreed in the collective bargaining agreement to make pension contributions on behalf of all truck drivers. Gerber had agreed with the local union, however, that the CBA would not be enforced, and that Gerber would contribute only for three employees. The court held that § 515 of ERISA does not permit employers to agree with the union to ignore the CBA and contribute on behalf of certain employees only.

A similar result was reached in Robbins v. Lynch, 836 F.2d 330 (7th Cir. 1988). In that case, Lynch signed a collective bargaining agreement, but later did not make pension fund contributions for several employees. Lynch claimed he had signed the agreement

only because the union threatened to strike unless certain employees were included within the CBA, and that he had never intended to abide by the agreement. Addressing Lynch's "intent not to be bound," the court of appeals stated:

> A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared. You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent not to be bound.

Robbins, 836 F.2d at 332.

Unlike **Gerber**, **Robbins** and other cases cited by plaintiffs, the CBAs signed by Friedmeyer and the other Produce Row employers clearly excluded casual employees from the benefits afforded regular employees. There were no secret agreements, false representations, oral modifications or

other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

Plaintiffs' case rests on the assumption that the Produce Row employers do not follow the "normal" definition of "casual employees." Plaintiffs cite cases that purport to establish the "generally recognized guidelines and parameters as to which employees will qualify as 'casual.'" But even those cases point out that, depending on the circumstances, casual employees may work on a full-time basis for several weeks or months at a time.

Nor does the Court believe, as plaintiffs suggest, that the casual employees on Produce Row have been the

victims of split-unit bargaining, which is impermissible under ERISA. Split-unit bargaining occurs when two groups of employees performing similar work receive different benefits. This issue normally arises in cases before the NLRB, which will examine two or more different bargaining units in light of "whether employees share a similar community of interest." **The Developing Labor Law** 416 (C. Morris 2d ed. 1983). Among the factors to be considered in determining community of interest apart from other employees are a difference of method of wages or compensation, different hours of work, different employment benefits, separate supervision, the degree of dissimilar qualifications, training and skills, differences in job functions and the history of bargaining. **Id.** **See Kalamazoo Paper Box Corp.**, 49 LRRM 1715, 1717, 136 NLRB 134, 137 (1962). Among

Produce Row employees, there is some similarity between the work performed by regular and casual employees. However, the distinctions between regulars and casuals -- seniority, compensation and other benefits, longevity of employment, work history and the fact that most casuals are not "career" employees -- outweigh the similarity between the two groups of employees. The community of interest between the two groups does not rise to the level required to place regular and casual employees within the same bargaining unit.

The Court finds, therefore, that defendant has not violated federal labor laws or the provisions of the collective bargaining agreement by not making pension fund contributions on behalf of casual employees. The Court recognizes that its decision today ratifies the past practice on Produce Row of designating

some workers as regular employees and others as casual employees. This result is required by the unique nature of the work on Produce Row. For example, some employees may work full time for 60 to 90 days and then not work again for a substantial period of time. Others may work as little as once every three to four weeks.

A court-imposed definition of the term "casual employee" would defeat one of the purposes of collective bargaining, which is to allow employers and union representatives to meet in a collegial setting and agree to certain employment practices that benefit all participants. The future of casual employees rests with the pension fund, Produce Row employers and the union -- not with the Court. Only through compromise will the employees and the union reach an agreement in which casual employees are

sufficiently defined so that the agreement will receive the required approval of the pension fund.

One might argue that the Court's decision opens the door for the employers on Produce Row to hire only casual employees, thereby avoiding the payment of any pension benefits. The obvious downfall of this argument is that a class of employees, regardless of the name given the class, is always free to bargain for employer-contributed benefits. The compensation paid to any employee -- on Produce Row or elsewhere -- is always determined by the supply and demand of the workforce. Today's decision reaffirms this principle.

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1712 C (5)
vs.	)	
HEIMOS PRODUCE COMPANY,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall, and in favor of defendant Heimos Produce Company on the merits of plaintiffs' complaint. This judgment, for its basis, adopts the memorandum entered this day in Central States, Southeast and Southwest Areas Pension

Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	FILED May 17, 1989 Eyvon Mendenhall U.S. District Court E. District of Mo.
Plaintiffs,	)	
v.	)	No. 84-1853C(3)
WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, and trustee Howard McDougall, and in favor of defendant Walter A. Rubin, d/b/a M.J.M. Produce Exchange on the merits of plaintiffs' complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and

Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 17th day of May, 1991.

/s/ William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed May 17, 1989
Plaintiffs,	)	No. 84-1832C(3)
vs.	)	
INDEPENDENT FRUIT AND PRODUCE COMPANY,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, and trustee Howard McDougall, and in favor of defendant Independent Fruit and Produce Company on the merits of plaintiffs' complaint.

This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 17th day of May, 1989.

/s/ William Hungate
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1857-C(1)
vs.	)	
JOHN MOON PRODUCE COMPANY, a corporation,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant John Moon Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas

Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1869-C(1)
vs.	)	
STANLEY PRODUCE, INC., a corporation,	)	
Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant Stanley Produce, Inc. on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas

Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed July 3, 1989
vs.	)	No. 84-1834-C(1)
ROBERT JOHNSON, an Individual, d/b/a J. JOHNSON FRUIT & PRODUCE COMPANY, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant, Robert Johnson d/b/a J. Johnson Fruit & Produce Company, on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central

States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL.,	)	Filed July 3, 1989
Plaintiffs,	)	No. 84-1658C(1)
vs.	)	
ADOLPH A. SOLOMON and IRL S. SOLOMON, Statutory Trustees for ADOLPH & CERESIA PRODUCE COMPANY,	)	
Defendants.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendants, Adolph A. Solomon and Irl S. Solomon, Statutory Trustees for Adolph & Ceresia Produce Company, on the merits of Plaintiffs' Complaint. This judgment,

for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed July 3, 1989
vs.	)	No. 84-1871-C(1)
UNITED FRUIT & PRODUCE COMPANY, a corporation, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant United Fruit & Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 3 day of July, 1989.

/s/ John Nangle
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, ET AL., Plaintiffs,	)	Filed August 28, 1989
vs.	)	No. 84-1689-C(4)
GOLDMAN FRUIT & PRODUCE COMPANY, a corporation, Defendant.	)	

JUDGMENT

IT IS HEREBY ORDERED that judgment is entered against Plaintiffs, Central States, Southeast and Southwest Areas Pension Fund, and Trustee Howard McDougall, and in favor of Defendant Goldman Fruit & Produce Company on the merits of Plaintiffs' Complaint. This judgment, for its basis, adopts the memorandum entered April 28, 1989, in Central States, Southeast and Southwest

Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C(5).

Dated this 28th day of August, 1989.

/s/ Clyde S. Cahill
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, a pension trust, and HOWARD McDOUGALL, a Trustee of the Central States Southeast and Southwest Areas Pension Fund,	)	Filed January 3, 1990
Plaintiffs,	)	No. 84-1657-C (4)
vs.	)	
FRANKLIN PRODUCE COMPANY, a Missouri corporation,	)	
Defendant.	)	

ORDER

IT IS HEREBY ORDERED that judgment be and is entered against plaintiffs Central States, Southeast and Southwest Areas Pension Fund, a pension trust, and Howard J. McDougall, its Trustee, and in favor of defendant

Franklin Produce Company, a Missouri corporation, on the merits of plaintiffs' complaint. This judgment, for its basis and rationale, adopts the memorandum entered on April 28, 1989, by Judge Stephen N. Limbaugh in Central States, Southeast and Southwest Areas Pension Fund, et al. v. N.E. Friedmeyer-Sellmeyer Distributing Company, No. 84-1669C (5) (copy attached).

SO ORDERED.

Dated this 3rd day of January, 1990.

/s/ Clyde S. Cahill
Clyde S. Cahill
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, et al.,	)	Filed April 28, 1989
Plaintiffs,	)	No. 84-1669 C (5)
vs.	)	
N.E. FRIEDMEYER-SELLMEYER DISTRIBUTING COMPANY,	)	
Defendant.	)	

MEMORANDUM

Plaintiffs Central States, Southeast and Southwest Areas Pension Fund and trustee Howard J. McDougall brought suit against N.E. Friedmeyer-Sellmeyer Distributing Company (Friedmeyer) and approximately 22 separate produce companies, all members of the St. Louis Fruit and Produce Association. Plaintiffs seek employer contributions on behalf of "casual employees," the definition of which is the essential issue in these

cases. This Memorandum constitutes the Court's findings of fact and conclusions of law for the purpose of Fed.R.Civ.P. 52(a).

I. Motions in Limine.

Prior to trial, both parties filed motions in limine, which the Court took with the case. The Court will address these motions prior to making its findings of fact and conclusions of law.

Defendant filed a motion to exclude the testimony of plaintiffs' expert witness, Professor Neil Bernstein. Defendant contends that Bernstein's application of labor law to the facts in this case is not proper testimony for an expert witness. Plaintiffs argue that the Court has the discretion to admit expert testimony bearing on the ultimate issues of the case.

Fed.R.Evid. 704 provides that an expert's testimony is not objectionable

merely because it embraces an ultimate issue to be decided by the trier of fact. This does not mean that all expert testimony is admissible. The Notes of the Advisory Committee to that rule explain that the opinion still must meet the standard set forth in Rule 702 that the testimony of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue."

There is no dispute that Professor Bernstein's credentials are substantial. Nevertheless, the Court cannot permit expert testimony on the ultimate legal issues to be determined by the Court. To allow such testimony would set a dangerous precedent that does little more than delegate the Court's duties to legal scholars. The Court will sustain defendant's motion and will exclude the testimony of Professor Bernstein in makings its decision in this case.

Plaintiffs filed three motions in limine. Plaintiffs' first motion addresses two issues: first, any oral agreement or understanding between Local 688 and the Produce Row companies concerning the payment of pension fund contributions for casual employees; and second, any understanding, practice or custom of dealing concerning casual employees between the Produce Row companies and Local 688. This motion goes to the crux of the issue in this case -- whether the Court may consider Friedmeyer's past practices in determining whether it now must contribute to the Pension Fund for casual employees. Because this motion goes to the ultimate issue before the Court, it will be addressed in the Court's conclusions of law.

In plaintiffs' second motion in limine, it contends that reports of

investigations by or proceedings before the National Labor Relations Board (NLRB) should be excluded from evidence. Plaintiffs' motion concerns an investigation made by the NLRB after a grievance was filed by Lon Jamison, an employee of M. Rizzo and Company, another Produce Row Company. The grievance was filed against M. Rizzo and Local 688, charging them with unfair labor practices. Similar grievances were filed by Mark Kerperion and Darell Chamberlain against George A. Heimos Produce Company and Local 688.

At trial, defendant introduced and the Court received into evidence, subject to plaintiffs' objection, defendant's exhibit Q, which is a letter to Kerperion from the NLRB. After an investigation, the NLRB determined that it would not issue a complaint in Kerperion's case. Defendant did not introduce any evidence

relating to the complaint Jamison filed with the NLRB.

Plaintiffs' argument against admission of the NLRB report would require a finding by the Court that the report lacks trustworthiness, and therefore would be inadmissible heresay. **See** Fed.R.Evid. 803(8)(C). Despite plaintiffs' contention, there is nothing about the report that indicates that it is not trustworthy. The Court will deny plaintiff's motion in limine.

Plaintiffs' third motion in limine seeks to exclude Vincent T. Vogler as a witness, or in the alternative, to disqualify him as counsel for defendant. In defendant's pretrial compliance, Vogler was listed as a witness defendant "will call." Plaintiffs listed Vogler in their pretrial compliance as a witness they "may call." On May 9, 1988, the first day of trial, Vogler withdrew as

counsel for defendant, and later testified on behalf of defendant. In light of Vogler's withdrawal as counsel for defendant, the Court will deny plaintiffs' third motion in limine.

II. Findings of Fact.

At the time of trial the parties filed a joint stipulation of findings of fact, leaving few factual issues in dispute. The Central States Pension Fund is an employee benefit plan within the meaning of the Employee Retirement Income Security Act of 1974 (ERISA) and the Multi-Employer Pension Plan Amendments Act of 1980 (MPPAA), 29 U.S.C. § 1002 **et seq**. Contributions to the Pension Fund are governed by certain Collective Bargaining Agreements (CBAs) entered into between the St. Louis Fruit and Produce Association (on behalf of defendant and other Produce Row companies) and Teamsters Local Union No. 688, affiliated with the

International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Collective Bargaining Agreements were executed in 1973, 1976, 1979 and 1982, each covering a three-year period.[1] Each CBA defined "employee" as follows in Article I, Section I:

> The term "Employee" as used in this Agreement shall include all employees engaged in the handling of merchandise in the shipping, receiving, storing and warehousing thereof including maintenance department employees, INCLUDING, but not by way of limitation, SUPERINTENDENTS, OFFICE AND CLERICAL EMPLOYEES.

Beyond this definition, employees are divided into three groups: regular, probationary and casual employees. Only probationary and casual employees are

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1 Plaintiffs filed this action on July 18, 1984, during the time the 1982 CBA was in effect. The 1985 CBA, which was nearly identical to the 1982 CBA, was in effect at the time this case was tried in May 1988.

specifically defined in the CBAs. The 1973, 1976 and 1979 CBAs defined probationary and casual employees in Article IX as follows:

> Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.
>
> Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees (casuals)." Such casuals may be used as follows and subject to the conditions listed:
>
> 1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason....

> 7. Uniform absentee records to be kept daily with amount of casual hours used.
>
> 8. When opening [sic] for regular employee occur, casuals working at that Company at that time, will be considered first for said opening before hiring from the outside, if they qualify.

The definitions of probationary and casual employees were changed in the 1982 CBA. Article IX, Section 1 provided that new employees would be on probation for a period of 60 days, and Section 2 eliminated the provision that casual employees could work a cumulative maximum of 80 hours during any calendar month. Finally, under the 1982 CBA, a seniority list was established for casual employees and they were given four paid holidays each year. These same provisions were also contained in the 1985 CBA.

The Produce Row employers also executed documents called pension

agreements that outlined the rates of the employers' pension contributions. The agreements also provided that the employers and the union would be bound by all the rules and regulations of the Central States Trust Agreement. The trust agreement requires the employers to make contributions in accordance with the collective bargaining agreements. Thus, the different agreements have gone full circle, requiring the Court to determine whether defendant and the other Produce Row employers have made pension fund contributions as required by the CBAs.

Historically, employees in the produce business hired two groups of employees -- those who received fringe benefits and those who did not. In recent years, the terms "regular employees" and "casual employees" have become associated with those two groups. Casual employees traditionally were hired to supplement

the work force during the peak periods, especially during the summer and Thanksgiving and Christmas holidays. Casuals also were used to replace employees who were not working due to vacation or sickness.

In addition to compensating regular employees with fringe benefits, the practice among Produce Row employers has been to pay regulars at a higher hourly rate than casual employees. On the job, regular employees could be distinguished from casuals by the different time cards they used and the union pins they wore. Until 1982, casual employees were not members of the union, and paid no union dues. Since 1982, they have received limited union benefits, including several paid holidays each year and recognition of seniority.

As beneficiaries of pension fund contributions, plaintiffs regularly

conduct audits of participating employers to determine compliance with collective bargaining agreements. Lamperson Fruit and Produce Company was selected at random for an audit by plaintiffs in October 1983. The Lamperson audit covered the period from September 28, 1980 to September 24, 1983. After the audit, James Dodd, Lamperson's owner, was informed that Lamperson owed $73,034.00 plus interest for "non-reporting of eligible Plan Participants." In the February 3, 1984 letter, plaintiffs' auditor concluded that Lamperson should make pension contributions for all employees who perform the same duties:

> The Fund's interpretation is that employees working consistently and performing the same duties as regular employees should not be classified as casual, but should be considered regular and eligible for pension contributions after they have completed their probationary period.

After the Lamperson audit, it became apparent to plaintiffs that it was the practice on Produce Row to hire casual employees who, in some cases, performed the same work as regular employees. Plaintiffs sought to conduct similar audits of Friedmeyer and other Produce Row employers. The employers refused to comply with the requests, and plaintiffs commenced separate actions against each of the Produce Row employers. On January 12, 1987, the Court ordered defendant to submit to an audit of its personnel records by plaintiffs for the purpose of determining whether defendant had complied with the provisions of the collective bargaining and trust agreements between the two parties between December 28, 1980 and December 31, 1983. **See Central States, Southeast and Southwest Areas Pension Fund v. N.E. Friedmeyer-Sellmeyer Distr. Co.**, 650 F.Supp. 978, 980 (E.D.Mo. 1987).

Following the audit, plaintiffs calculated the amount they believed Friedmeyer owed the pension fund for persons classified as casual employees, but who were performing the same work as regular employees. Plaintiffs' Exhibit 41 showed an adjustment of $39,073.00. This exhibit was corrected by Plaintiffs' Exhibit 62, which omitted two employees who were not covered by the CBA. Exhibit 62 shows a corrected balance due from Friedmeyer of $24,774.00. Plaintiffs now seek to collect those funds.

III. Conclusions of Law.

The Court has subject matter jurisdiction pursuant to § 301 of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. § 185(a); § 502 of ERISA, 29 U.S.C. § 1132; and 28 U.S.C. § 1331.

Central States was not a party to the collective bargaining agreement between

the Produce Row employers and the union. Rather, the pension fund is a third-party beneficiary of the collective bargaining agreement, **Robbins v. Lynch**, 836 F.2d 330, 333 (7th Cir. 1988), and is entitled to maintain an action to collect unpaid pension contributions under ERISA § 502. To aid employers and fund trustees with the collection of delinquent contributions, Congress enacted § 515 of ERISA, 29 U.S.C. § 1145, which provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions on such agreement.

Fund trustees are given broad authority in actions to collect overdue contributions because the class of potential beneficiaries includes all

employees who were covered employees within the meaning of a collective bargaining agreement, not just those employees for whom pension contributions were made.

The interpretation of a collective bargaining agreement is a question of law to be resolved by the Court by applying federal law principles. **Walsh v. Schlecht**, 429 U.S. 401, 407 (1977); **Abbate v. Browning-Ferris Industries**, 767 F.2d 52, 55-56 (3d Cir.1985). These principles must be fashioned from the policy of our national labor laws. **Id.** at 56 (quoting **Textile Workers Union v. Lincoln Mills**, 353 U.S. 448, 458 (1957)).

Where there is an ambiguity in a collective bargaining agreement, normal common law rules of construction do not apply. In **Transportation Communication Employees Union v. Union Pacific R.R. Co.**, 385 U.S. 157 (1966), the Supreme

Court stated, "In order to interpret such an agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." Id. at 161. See also Pierce County Hotel Employees and Restaurant Employees Health Trust v. Elks Lodge No. 1450, 827 F.2d 1324, 1327 (9th Cir. 1987)(interpretation of ambiguous term "depends on the parties' intent at the time of the contract s execution, in light of earlier negotiations, later conduct, related agreements and industrywide custom"). The use of extrinsic evidence to interpret an ambiguity must not be confused with the oral modification of a collective bargaining agreement, which is not enforceable. See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No.

87-2480, slip op. at 2 n.1 (7th Cir. March 17, 1989); **Operating Engineers Pension Trust v. Beck Engineering**, 746 F.2d 557, 568-69 (9th Cir. 1984).

Plaintiffs contend defendant is liable for pension fund contributions under five consecutive collective bargaining agreements covering the period from 1973 to 1988. The use of the term "casual employee" in these agreements creates an ambiguity that requires the Court to apply the rules of construction outlined above. The long-standing practice on Produce Row has been to hire certain persons who do not work as regular employees. Generally, casual employees were hired as extras during the peak periods or to fill in for regular employees who were sick or on vacation. It is not disputed that on some occasions casuals would work as much as regulars, but this is to be expected in an industry

where the workload is irregular and unpredictable.

Each of the CBAs between the Produce Row employers and the union reflects the practice of hiring casual employees who, because of their temporary status, do not receive the same wages, benefits or job security as regular employees. Although the 1973, 1976 and 1979 CBAs limited casuals to working 80 hours per month, neither the employees, Produce Row employers or the union adhered to this limit during the period covered by the agreements. Rather, it appears that this provision was merely an aberration from the time-honored tradition and practice of using casuals heavily during the peak periods and slacking off when there was less work to be performed.

The employers and union "corrected" the 80-hour rule in the 1982 CBA, when the limitation was eliminated. There is

no explanation why it took so long to conform the CBA to the practice and intention of the employers and union. Regardless of the reason, the change reflects the clear intention of the parties to the bargaining agreement that casual employees not be limited to working 80 hours per month. This history is helpful in defining the term "casual employees" as used in the collective bargaining agreements.

Plaintiffs suggest that the Produce Row employers and the local union orally modified the CBAs to the detriment of Central States and future claimants. The Court does not believe the cases cited by plaintiffs support this contention. The typical case plaintiffs cite involved the collection of pension fund contributions for persons who were covered by a CBA, but on whose behalf no contributions had been made. For example, in **Central**

States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc., No. 87-2480, slip op. (7th Cir. March 17, 1989), Gerber agreed in the collective bargaining agreement to make pension contributions on behalf of all truck drivers. Gerber had agreed with the local union, however, that the CBA would not be enforced, and that Gerber would contribute only for three employees. The court held that § 515 of ERISA does not permit employers to agree with the union to ignore the CBA and contribute on behalf of certain employees only.

A similar result was reached in **Robbins v. Lynch**, 836 F.2d 330 (7th Cir. 1988). In that case, Lynch signed a collective bargaining agreement, but later did not make pension fund contributions for several employees. Lynch claimed he had signed the agreement

only because the union threatened to strike unless certain employees were included within the CBA, and that he had never intended to abide by the agreement. Addressing Lynch's "intent not to be bound," the court of appeals stated:

> A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared. You can't escape contractual obligation by signing with your fingers crossed behind your back, even if that clearly shows your intent not to be bound.

Robbins, 836 F.2d at 332.

Unlike **Gerber**, **Robbins** and other cases cited by plaintiffs, the CBAs signed by Friedmeyer and the other Produce Row employers clearly excluded casual employees from the benefits afforded regular employees. There were no secret agreements, false representations, oral modifications or

other plans not to abide by the collective bargaining agreements. Quite simply, the Produce Row employers acted exactly as they agreed -- they contributed to the pension fund on behalf of regular employees, but not on behalf of casual employees.

Plaintiffs' case rests on the assumption that the Produce Row employers do not follow the "normal" definition of "casual employees." Plaintiffs cite cases that purport to establish the "generally recognized guidelines and parameters as to which employees will qualify as 'casual.'" But even those cases point out that, depending on the circumstances, casual employees may work on a full-time basis for several weeks or months at a time.

Nor does the Court believe, as plaintiffs suggest, that the casual employees on Produce Row have been the

victims of split-unit bargaining, which is impermissible under ERISA. Split-unit bargaining occurs when two groups of employees performing similar work receive different benefits. This issue normally arises in cases before the NLRB, which will examine two or more different bargaining units in light of "whether employees share a similar community of interest." **The Developing Labor Law** 416 (C. Morris 2d ed. 1983). Among the factors to be considered in determining community of interest apart from other employees are a difference of method of wages or compensation, different hours of work, different employment benefits, separate supervision, the degree of dissimilar qualifications, training and skills, differences in job functions and the history of bargaining. **Id.** **See Kalamazoo Paper Box Corp.**, 49 LRRM 1715, 1717, 136 NLRB 134, 137 (1962). Among

Produce Row employees, there is some similarity between the work performed by regular and casual employees. However, the distinctions between regulars and casuals -- seniority, compensation and other benefits, longevity of employment, work history and the fact that most casuals are not "career" employees -- outweigh the similarity between the two groups of employees. The community of interest between the two groups does not rise to the level required to place regular and casual employees within the same bargaining unit.

The Court finds, therefore, that defendant has not violated federal labor laws or the provisions of the collective bargaining agreement by not making pension fund contributions on behalf of casual employees. The Court recognizes that its decision today ratifies the past practice on Produce Row of designating

some workers as regular employees and others as casual employees. This result is required by the unique nature of the work on Produce Row. For example, some employees may work full time for 60 to 90 days and then not work again for a substantial period of time. Others may work as little as once every three to four weeks.

A court-imposed definition of the term "casual employee" would defeat one of the purposes of collective bargaining, which is to allow employers and union representatives to meet in a collegial setting and agree to certain employment practices that benefit all participants. The future of casual employees rests with the pension fund, Produce Row employers and the union -- not with the Court. Only through compromise will the employees and the union reach an agreement in which casual employees are

sufficiently defined so that the agreement will receive the required approval of the pension fund.

One might argue that the Court's decision opens the door for the employers on Produce Row to hire only casual employees, thereby avoiding the payment of any pension benefits. The obvious downfall of this argument is that a class of employees, regardless of the name given the class, is always free to bargain for employer-contributed benefits. The compensation paid to any employee -- on Produce Row or elsewhere -- is always determined by the supply and demand of the workforce. Today's decision reaffirms this principle.

Dated this 28th day of April, 1989.

/s/ Stephen Limbaugh
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 89-1927

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

INDEPENDENT FRUIT AND PRODUCE CO., a Missouri corporation,
Appellee.

No. 89-1928

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WALTER A. RUBIN, d/b/a M.J.M. PRODUCE EXCHANGE,
Appellee.

Appeals from the United States District Court for the Eastern District of Missouri.

No. 89-1929

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SUGAR RIPE BANANA COMPANY,
Appellee.

No. 89-1933

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

N.E. FRIEDMEYER-SELLMEYER, DISTRIBUTING COMPANY,
Appellee.

No. 89-1934

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

SALVATORE PUPILLO, d/b/a PUPILLO FRUIT COMPANY,
Appellee.

No. 89-1935

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GEORGE A. HEIMOS PRODUCE COMPANY, INC.,
Appellee.

No. 89-1936

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

WILLIAM MANTIA FRUIT COMPANY, INC.,
Appellee.

No. 89-1937

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ST. LOUIS BANANA AND TOMATO COMPANY, INC.,
Appellee.

No. 89-2204

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

LAMPERSON FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2205

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

LOMBARDO FRUIT AND PRODUCE COMPANY,
Appellee.

No. 89-2206

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

JOHN MOON PRODUCE COMPANY, Appellee.

No. 89-2207

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellants,

v.

STANLEY PRODUCE, INC., Appellee.

No. 89-2208

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ROBERT JOHNSON, d/b/a J. JOHNSON, FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2209

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

ADOLPH A. SOLOMON AND IRL S. SOLOMON, STATUTORY TRUSTEES FOR ADOLPH & CERESIA PRODUCE CO.,
Appellees.

No. 89-2210

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

UNITED FRUIT & PRODUCE COMPANY,
Appellee.

No. 89-2438

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

GOLDMAN FRUIT & PRODUCE CO., INC.,
Appellee.

No. 90-1160

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

JULES J. SCHWARTZ AND JOSEPH F. SCHWARTZ, d/b/a NEW MARKET PRODUCE COMPANY,
Appellees.

No. 90-1161

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

FRANKLIN PRODUCE COMPANY, a Missouri Corporation,
Appellee.

No. 90-1162

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellants,

v.

MARSKE PRODUCE COMPANY, INC.,
Appellee.

No. 89-2839

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE,
Appellee,

v.

GEORGE A. HEIMOS PRODUCE CO., INC.,
Appellant.

No. 89-2840

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and HOWARD McDOUGALL, TRUSTEE, Appellee,	*
v.	*
N.E. FRIEDEMEYER-SELLMEYER DISTRIBUTING COMPANY, Appellant.	*

Appellees' petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

February 11, 1991

Order Entered at the Direction of the Court:
/s/
Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

29 U.S.C. §186. Restrictions on financial transactions.

Payment or lending, etc., of money by employer or agent to employees, representatives, or labor organizations.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value --

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

Request, demand, etc., for money or other thing of value.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided*, That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any of his employees as compensation for their services as employees.

Exceptions

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and

exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain

provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; (6) with respect to money or other thing of value paid by any employer to a trust fund established by such representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs; *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: *Provided*, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: *Provided further*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; or (8) with respect to money or any other thing

of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: *Provided*, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: *Provided further*, That no such legal service shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under subchapter II of this chapter or this chapter; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959.

Penalty for violations

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than $10,000 or to imprisonment for not more than one year, or both.

Jurisdiction of courts

(e) The district courts of the United States and the United States courts of the Territories and

possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 381 of Title 28 (relating to notice to opposite party) to restrain violations of this section, without regard to the provisions of section 17 of Title 15 and section 52 of this title, and the provisions of chapter 6 of this title.

Effective date of provisions

(f) This section shall not apply to any contract in force on June 23, 1947, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

Contributions to trust funds

(g) Compliance with the restrictions contained in subsection (c)(5)(B) of this section upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c)(5)(A) of this section be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

29 U.S.C. §1145 Delinquent contributions

Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

_I_N_D_E_X_

RECEIVED

CONT.

PRODUCE ROW

Oct. 2, 1973

JUNE 1st, 1973

RECEIVED

TO

MAIL

MAY 31st, 1976

(Illegible)

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)". Such casuals may be used as follows and subject to the conditions listed:

1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the followings:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

As of DECEMBER 31st of each year beginning with DECEMBER 31, 1969, the Employer's schedule shall be checked to ascertain the number of weeks in which vacations are scheduled. If on such schedule, vacations are scheduled for each of the fifty-two (52) weeks of the subsequent calendar year, the following formula shall be applied.

(a) Take the maximum number of employees scheduled for vacations which is common to each of the 52 weeks.

(b) Subtract this number from the number of employees scheduled for vacations in each particular week.

(c) The result obtained under paragraph (b) will determine the number of casuals who may be used for vacation replacements in each particular week.

EXAMPLE: For instance, if there are four (4) employees scheduled for vacation in each of twenty (20) weeks; three (3) employees scheduled for vacations in each of twenty-eight weeks; two (2) employees scheduled for vacations in each of four (4) weeks, the figure to be used for paragraph (a) above will be "TWO" ("2").

Using the instructions of paragraph (B) above, subtract two (2) from the number scheduled for vacations in each particular week. For those weeks with four (4) scheduled for vacations, subtract two (2) from four (4) leaving the Employer with the right to use two (2) casuals if replacements are needed, to fill two (2) vacation vacancies. For those weeks with three (3) employees scheduled for vacations subtract two (2) from three (3) leaving the Employer with the right to use one (1) casual if replacement is needed to fill such vacation vacancy. For those weeks with two (2) employees scheduled for vacations, the Employer would have no right to use casuals to fill vacation vacancies.

Vacation vacancies not filled by regular employees may be filled by casuals. When casuals are not available

to fill a daily vacancy on a particular shift, they may be used on any shift when available thereafter.

I N D E X

PRODUCE ROW

JUNE 1st, 1976

TO

MAY 31st, 1979

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A now employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)". Such casuals may be used as follows and subject to the conditions listed:

1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

2. Notwithstanding the limitation in paragraph 1 above, casuals may be hired to work a cumulative maximum of eighty (80) hours during any calendar month for purposes of overflow work.

3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the following:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

I N D E X

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TO

MAY 31, 1982

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a thirty (30) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After thirty (30) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire.

Section 2. Casual Employees - Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)". Such casuals may be used as follows and subject to the conditions listed:

1. Casuals may be hired where the normal then existing number of working employees is not thereby increased.

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3. Casuals shall receive the regular rate for the classification in which they

work, including the shift differential, if any.

4. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Vacation, Holidays, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare, Pension and Charitable Foundation); and no seniority shall be acquired by such casuals.

5. Casuals shall be entitled to no guaranteed minimum number of hours.

6. Casuals may be used to replace regular employees who are absent for any reason, including but not limited to, vacations, and illness; provided, however, casuals will be used to fill vacancies on the shift where the vacancy occurs or exists. Casuals will not be used to fill vacation vacancies or other known vacancies of one calendar week or more on the day shift. The use of casuals to fill vacations shall be governed by the following:

7. Uniform absentee records to be kept daily with amount of casual hours used.

8. When opening for regular employee occur, casuals working at that Company at that time, will be considered first for

said opening before hiring from the outside, if they qualify.

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ARTICLE IX PROBATIONARY AND CASUAL EMPLOYEES

Section 1. Probationary Employees - A new employee shall work under the provisions of this Agreement but shall be employed only on a sixty (60) day trial period during which period he may be discharged at the discretion of the Employer, provided, however, that the Employer may not discharge or discipline for the purpose of evading this Agreement or discriminating against Union members. After sixty (60) days the employee shall be placed on the regular seniority list and his seniority date shall revert to his last date of hire. Employees that are hired as probationary employees from the casual list shall not be required to complete a sixty (60) day trial period.

Section 2. Casual Employees - The Employer may hire, subject to need, persons who will be known as "casual employees' (casuals)".

Section 3. When openings for regular employees occur, casuals working at that Company, at that time, will be considered first for said opening before hiring from the outside, if they qualify.

Section 4. Casuals shall be entitled to no guaranteed minimum number of hours.

Section 5. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare and Pension); and no seniority shall be acquired by such casuals. Casual employees shall receive four (4) paid holidays: New Year's Day, Christmas Day, Fourth of July and Labor Day.

Section 6. The Company shall establish a seniority list for casual employees. Casual employee's seniority shall be established as of January 31, 1982 or the date of hire, whichever is later.

CSU Cleveland State University Industrial Relations Center

James J. Nance
College of Business Administration
University Center, Room 460
2121 Euclid Avenue
Cleveland, Ohio 44115

Telephone: (216) 687-4750

March 20, 1991

Helen Gibson
Greensfelder, Hemker & Gale
10 South Broadway
Suite 1800
St. Louis, MO 63102

Dear Helen,

My apologies for the delay in sending your materials! I have been at a training seminar for the past week and my office did not feel comfortable sending the materials out without my approval. I certainly hope that the delay has not caused any inconvenience.

Enclosed you will find the summary sheet detailing our findings along with the blind sample language showing the sample that we found. As a caution, I wish to remind you that when we searched we were locating any use and/or definition of the word "casuals" or the phrase "casual employee". We did not interpret in any way the language we uncovered. I say this only to insure that you understand that while we found

Section 5. Fringe benefits shall not be paid on account of casuals (such as, but not limited to, Sick Leave, Funeral Leave, Jury Pay, LHI, Welfare, Medicare and Pension); and no seniority shall be acquired by such casuals. Casual employees shall receive four (4) paid holidays: New Year's Day, Christmas Day, Fourth of July and Labor Day.

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a number of references to the term that they may or may not support your stance.

If we can be of further service please do not hesitate to call.

Sincerely,

/s/ Sharon A. Brown
Sharon A. Brown
Administrator
Contract Library and Information Service
B:cj

Summary

Total number of collective bargaining agreements reviewed: 500

Total of the sample containing either the phrase "Casual Employee" or the term "Casual": 26

17 of the 26 contained definitions
9 of the 26 contained passing reference to the term

Distribution by Industry		# of Workers Covered
Manufacturing	1	5,000
Hospital	8	12,900
Service/Hotel	8	26,700
Utility	3	5,252
Cartage/Truck	6	285,000

Distribution by State

Multi-state	5
California	6
Florida	4
Minnesota	3
Hawaii	2
Washington	2
Ohio	1
Illinois	1
Iowa	1
Connecticut	1

"(material excised from the original)"

The following are terms and definitions that are used throughout this contract.

Full-time: The term "full-time" applies to a nurse working or employed by the Hospital to work eighty (80) hours in a two-week period or forty (40) hours per week.

Less than Full-Time:

Part-time: The term "part-time" applies to any nurse employed by the Hospital to work on a regularly scheduled continuing basis, for a usual specified number of hours from 32-79 hours per pay period.

Casual: The term "casual" applies to any nurse employed by the Hospital to work on a regularly scheduled continuing basis, for a usual specified number of hours from 1-31 hours per pay period.

Less than Minimal: The term "less than minimal" applies to any nurse employed by the Hospital to supplement the staffing needs. This nurse is not regularly scheduled any hours.

"(material excised from the original)"

2. A Casual Nurse is one who is employed to work on an intermittent basis.

3. A Temporary Nurse is one who is hired as an interim replacement, or one who is hired for temporary work on a predetermined work schedule which does not extend beyond three (3) calendar months.

"(material excised from the original)"

B. Casual Employees

(1) A casual employee is an individual who is not on the regular seniority list and who is not serving a probationary period. A casual may be either a replacement casual or a supplemental casual as hereinafter provided. Casuals shall not have seniority status. Casuals shall not be discriminated against for future employment.

(2) Replacement casuals may be utilized by an Employer to replace regular employees when such regular employees are off due to illness, vacations or other absence.

(3) Supplemental casuals may be used to supplement the regular work force as provided for in each respective Supplement. Once the number of new employees to be added as required in the Supplement is determined, the Employer must initiate the processing of the new probationary employees immediately, and

complete such processing as provided for in the Supplements.

(4) A monthly list of all extra (e.g. laid-off), casual (supplemental or replacement) and/or probationary employees used during that month shall be submitted to the Local Unions by the tenth (10th) day of the following month. Such list shall show:

(a) The employee's name, address, and Social Security number;

(b) The dates worked;

(c) The classification of work performed each day, and the hours worked;

(d) The name, if applicable, of the employee replaced.

This list shall be compiled on a daily basis, and shall be available for inspection by a union representative and/or shop steward.

"(material excised from the original)"

(b) **Probationary employee**. All new regular full-time employees shall be considered probationary employees for a period of ninety (90) calendar days. The Company reserves the right to terminate their employment for any reason until they have completed such probationary period. However, probationary employees shall be entitled to utilize the Grievance Procedure to grieve any matter which could be grieved by any other employee except termination within the probationary period of ninety (90) days.

(c) **Casual-regular employee**. Casual-regular employees are regularly scheduled at least one (1) day per week but less than four (4) days per week.

(d) **Casual-temporary employee**. Casual-temporary employees are scheduled to accommodate a specific period of expanded activity: i.e., summer season and holidays.
(NOTE: Casual-regular and casual-temporary employees are not covered by this Agreement.)

SECTION 6. UTILIZATION OF CASUAL EMPLOYEES.

(a) **Summer season**. Casual-regular and casual-temporary employees may be used for an expanded schedule of four (4) or more days per week and twenty (20) hours or more per week during the summer season which is deemed to begin with the week which contains March 1st, and to end with the week which contains August 31st. For this purpose, a week is deemed to begin with the first shift on Sunday and to end with the third shift on Saturday.

(b) **Other expanded activity**. A casual-regular and casual-temporary employee may be used for expanded schedules such as holiday periods for four (4) or more days per week and twenty (20) or more hours per week not to exceed thirty (30) calendar days for each period.

"(material excised from the original)"

Section 5 - Notification

(a) **Casual Employees**: For casual employees who work on a day-to-day basis, the Local Hiring Hall shall immediately supply such help to the Employer upon notice by the Employer that such casual employees are needed. In the event such casual help is not immediately available or the Local

Hiring Hall is closed, the Employer may then hire such casual workers from any other available source.

The Employer shall hire all casual or extra help in accordance with the terms of the hiring procedure outlined in the Local Union territorial jurisdiction where the work is performed. However, where there is heavy demand for casual or extra helpers in areas where loading and unloading is done, such casual or extra helpers may be permanently assigned to such areas.

(b) **Regular Employees**. If the Local Hiring Hall is unable to furnish qualified regular employees within forty-eight (48) hours after the Employer calls for them, the Employer shall be able to procure such employees from any other source. In such event, the Employer shall, within twenty-four (24) hours of the time of hiring, notify in writing the Local Union maintaining the hiring hall in that area of the name, address, social security number, and place of last employment of any employee so hired.

"(material excised from the original)"

2.4 CLASSES OF EMPLOYEES.

A. Regular Employee Defined. Regular employees are those who work a predetermined work schedule of between twenty (20) and forty (40) hours per week.

1. Regular Full-Time Employees. A regular full-time employee is one who works a predetermined work schedule amounting to forty (40) hours per week.

2. Regular Part-Time Employees. A regular part-time employee is one who works a predetermined work schedule amounting to twenty (20) hours or more per week but less than forty (40) hours per week.

B. Part-Time Employees. A part-time employees is one who works a predetermined work schedule amounting to fewer than twenty (20) hours per week.

C. Call-in or Casual Employees. A call-in or casual employee is one who works on an intermittent basis as the business warrants.

"(material excised from the original)"

Section 4 - Casual Employees

Casual employees are defined under this Agreement, consistent with applicable law under the National Labor Relations Act, as persons who are employed by the Employer on an intermittent or sporadic basis. In applying this definition to persons employed on a per diem basis in classifications otherwise covered by this Agreement, the Employer and the Union shall regard as casual employees per diem employees who work less than sixteen (16) hours over two (2)

successive payroll periods ending in the same calendar month.

"(material excised from the original)"

Section 2

(A) A regular employee is one who is employed by the Company on a job within the classifications covered by this agreement for the purpose of performing such work as has to be done continuously and regularly.

(B) All employees hired on a regular basis are to serve a probationary period of six (6) months from the original date of regular employment and are to be considered as on trial during such period. During this trial period, such employees should show an aptitude for the work in which they are engaged and the ability and desire to advance to the skilled classifications. In the event an employee makes a voluntary transfer or is promoted, the probationary period will be extended an additional six (6) months when notified by the Company, in writing, delivered to the Union at least fifteen (15) days prior to the expiration of the six (6) month period. During this trial period, the Company may, at its option, transfer, lay-off, or dismiss such employees; however, in all other matters these employees shall be entitled to benefits provided by this agreement.

(C) (1) A temporary employee is one who is employed by the Company on a job within the classifications covered by this agreement for a limited time on

a purely temporary basis for a period not to exceed six (6) months. If temporary employment, other than employment on a contingent basis, continues for more than six (6) months, the job shall be considered as a regular job and posted accordingly.

(2) A temporary or casual employee will receive wages, overtime pay and meals as provided for in this agreement and will be entitled to holidays with pay provided he works the work-day before and the work-day following the holiday.

(3) In the event new construction is contracted out, such work shall be performed under the applicable building trades wages and conditions.

(D) A reasonable number of student engineers may be assigned work in any department in classifications covered by the bargaining unit as a part of their training and, while so employed, shall neither be affected by provisions of this agreement, nor shall their employment affect the status of employees covered by this agreement. No student engineer shall work at any one job or classification for a period in excess of six (6) months.

(E) Temporary student employees will be held to a minimum and shall not affect the hiring of regular employees. These employees will be paid according to the jobs to which they are assigned.

"(material excised from the original)"

21.0 DEFINITIONS

The following terms have the meaning stated wherever used in this Agreement.

21.1 The probationary period of an Employee is the first six (6) months of his employment.

21.2 A regular Employee is one hired for indefinite tenure, not limited at time of hire by a stated term or for a specific project.

21.3 A temporary Employee is one hired for a specific project or definite period, in either event not exceeding six (6) months, with such limited period of employment stipulated at time of hire.

21.4 A casual Employee is one employed in a non-bid classification other than a Journeyman who has no regularly established work week, whose days or hours of work are not fixed, and who works solely on call. Such employees shall be employed only as a Hydro Maintenance Man; as a Groundman as provided in Section 16.3.9; or as a Meter Reader, as provided in Section 17.12.1.

21.5 A full-time Employee is one whose regular work week is forty (40) hours.

21.6 A part-time Employee is one whose regular work week is less than forty (40) hours.

"(material excised from the original)"

ARTICLE 37
CASUAL EMPLOYEES

Section 1. The Company may employ casual employees in the Production Department on a daily basis. Casual employees will not be employed during the regular workweek (Monday through Friday) during any week in which regular employees on layoff have not been offered five (5) days work opportunity. Provided that, if circumstances occur on a non-repetitive basis which are of an emergency nature, i.e., the situation could not be foreseen and immediate action must be taken to prevent product loss or limitation of production, then the restriction concerning the employment of casuals set forth previously shall not be applicable. Provided further, that should a regular employee on layoff be unavailable or decline recall for absentee replacement pursuant to Article 3, Section 6, the Company may call a casual and the restriction concerning the employment of casuals set forth previously shall not be applicable. Claimed abuse shall be subject to the grievance procedure.

The Company may employ casual employees on holidays and weekends consistent with the provisions of Article 10, Section 5(A)(4).

Section 2. RECALL

(1) All casual employees shall be considered probationary for the first forty (40) days worked, and shall be worked in accordance with their date of hire. Upon completion of their probationary period, such employees

shall be credited with recall rights in the casual classification as of the date they complete the probationary period.

(2) Casual employees may be worked on a regular work day, consistent with their casual recall status, and the provisions of Section 1 of this Article. Casual employees' work on a weekend or holiday is governed by the provisions of Article 10, Section 5.

(3) Recall rights in the casual classification shall be lost by:

(1) Quit or discharge
(2) Layoff in excess of one (1) year
(3) Unavailability for work for three (3) assignments

"(material excised from the original)"

ARTICLE XVIII

Casual and Temporary Employees

1. Temporary employment is continuous, regularly scheduled, predictable employment of less than six (6) months' duration, and can be full-time or part-time.

2. Casual employment is discontinuous and irregularly scheduled employment and can be full-time or part-time.

3. Temporary and casual employees are not covered by this Agreement.

4. No casual or temporary employee shall be used in a position previously occupied by a Staff Member which has been vacated, unless (i) the position has been posted and the hiring of a permanent replacement is in process, or (ii) the University determines that the position need be covered only on a discontinuous and irregularly scheduled basis, or on a temporary basis as defined in paragraph 1 above. Every month the University will send the Union a list of all casual and temporary employees showing names, work units, and starting dates.

5. No temporary position shall continue for more than six (6) months, and no temporary employee shall be used in the same budgetary unit for more than six (6) months during any twelve (12) month period (except as a substitute for a Staff Member on a leave of absence).

6.(a) No position (as limited by the following sentence) in any budgetary unit shall be filled by hiring a casual employee for more than twenty (20) weeks during any twelve (12) month period. It is understood that if two (2) or more Staff Members hold the same job title in a work unit within the budgetary unit and/or perform the same or similar work, the work performed by such Staff Members shall be considered only one position for purposes of applying the preceding sentence.

(b) No casual employee shall be used in the same budgetary unit for more than twenty (20) weeks during any twelve (12) month period.

7. The use of casual employees or temporary employees may, however, exceed the limitations stated in paragraphs 5 and 6, either (i) by agreement with the Union or (ii) if such extended use does not have the effect of avoiding the creation of a regularly scheduled position and/or denying the opportunity for additional straight-time hours for qualified Staff Members in the same work unit.

8. Presently employed casual and temporary employees who have been working in the same budgetary unit for more than one (1) calendar year in circumstances which violate the guidelines in paragraphs 5 and 6 above shall be made permanent (without posting the positions involved). All other temporary or casual positions which now violate such guidelines, or which in the future reach the limitation of those guidelines, shall be posted as permanent positions, or the work shall be terminated.

9. Except for student employment, the above definitions and limitations shall apply to all temporary and casual employment involving the kinds of work normally performed by Staff Members.

"(material excised from the original)"

(e) There shall be established and maintained within each Hospital, a pool of casual part-time nurses employed by the Hospital to be utilized to supplement the full and regularly scheduled part-time staff. A less than minimal hours nurse shall be called or scheduled to work in a manner mutually agreeable between the nurse and the Hospital. A less than minimal hours nurse is not assured the availability of work on a regular continuing basis; but a less than minimal hour nurse is not obligated to report to duty each time he or she is requested to work. Less than minimal hours nurses may be assigned a station unit or may be utilized to float among station units. To maintain less than minimal hours status, a nurse shall not be unavailable to work for a period greater than two (2) consecutive months unless such nurse requests and is granted a leave of absence.

If a nurse transfers to a less than minimal hours status, he or she shall accrue no additional vacation or sick leave benefits. Such benefits or credited time toward these benefits shall be maintained on the nurse's record and restored to the nurse at such time as he or she transfers back to full-time or regularly scheduled part-time or casual status.

Less than minimal hours nurses shall receive salary increments as described in Carts A and B on the basis of one (1) year's service for each two thousand eighty (2,080) compensated hours.

A less than minimal hours nurse shall be given a minimum of two (2) hours advance notice of the cancellation of any shift of work for which the nurse has agreed to work.

(f) Except as otherwise expressly limited or qualified by this Section 5, or another section of this Contract Agreement, a less than full-time nurse shall be entitled to the benefit of the other sections of this Agreement.

"(material excised from the original)"

(c) Regularly scheduled part-time nurses shall be eligible for the benefits below if they are willing to share weekend duty with the full-time staff and to share proportionately relief and night duty with the full-time staff:

(1) Salary increments as described in Charts A and B on the basis of credit for one (1) year's service for each two thousand eighty (2,080) compensated hours.

(2) After completion of one (1) full year of continuous service, vacation benefits as described in Section 9 on a pro-rated basis. The amount of salary to be paid to the nurse will be based upon the average number of compensated hours per two (2) week payroll period during the preceding year.

(3) Regularly scheduled part-time nurses as described in part (c) of this Section 6 who have averaged thirty-two (32) compensated hours or more per two (2) week payroll period will be entitled to sick leave with pay for personal illness. Sick leave will be earned and accumulated in the same manner as provided for full-time nurses in Section 10 of this Agreement prorated on the basis of one (1) sick leave day earned for each 173.3. compensated hours up to the maximum accumulation. The Hospital may request reasonable evidence of such illness. Sick leave will be granted for absences from work only on a day scheduled as a work day.

(d) A change in status from full-time to part-time or from part-time to full-time shall not work a forfeiture of earned benefits. A change in status from full-time to part-time or from part-time to full-time shall not work a loss of credited standing to earn benefits, which benefits are contractually provided in the status to which the nurse has changed. Credited vacation standing earned as a part-time nurse who has changed to a full-time nurse status will be determined on the basis of credit for one (1) year's service for each two thousand eighty (2,080) compensated hours.

(e) There shall be established and maintained within each Hospital, a pool of casual part-time nurses employed by the Hospital to be utilized to supplement the full and regularly scheduled part-time staff. A casual

part-time nurse shall be called or scheduled to work in a manner mutually agreeable between the nurse and the Hospital. A casual part-time nurse is not assured the availability of work on a regular continuing basis; but a casual part-time nurse is not obligated to report to duty each time she or he is requested to work. Casual part-time nurses may be assigned a station unit or may be utilized to float among station units. To maintain casual part-time status, a nurse shall not be unavailable to work for a period greater than two (2) consecutive months unless such nurse requests and is granted a leave of absence.

If a nurse transfers to a casual part-time nurse status, she or he shall accrue no additional vacation or sick leave benefits. Such benefits or credited time toward these benefits shall be maintained on the nurse's record and restored to the nurse at such time as she or he transfers back to full-time or regularly scheduled part-time status.

Casual part-time nurses shall receive salary increments as described in Charts A and B on the basis or one (1) year's service for each two thousand eighty (2,080) compensated hours.

A casual part-time nurse shall be given a minimum of two (2) hours advance notice of the cancellation of any shift of work for which the nurse has agreed to work.

(f) Except as otherwise expressly limited or qualified by this Section 6, or another section of this Contract Agreement, a part-time nurse shall be entitled to the benefit of the other sections of this Agreement.

"(material excised from the original)"

(c) Casual-Regular Employee. Casual-regular employees are regularly scheduled at least one (1) day per week but less than four (4) days per week.

(d) Casual-Temporary Employee. Casual-temporary employees are scheduled to accommodate a specific period of expanded activity, i.e., summer season and holidays.

(NOTE: Casual-regular and casual-temporary employees are not covered by this Agreement.)

SECTION 6. Utilization of Casual Employees.

(a) Summer Season. Casual-regular and casual-temporary employees may be used for an expanded schedule of four (4) or more days per week and twenty (20) hours or more per week during the summer season which is deemed to begin with the week which contains March 1st, and to end with the week which contains August 31st. For this purpose a week is deemed to begin with the first shift on Sunday and to end with the third shift on Saturday.

(b) Other expanded activity. A casual-regular and casual-temporary employee may be used for expanded schedules such as holiday periods for four (4) or more days per week and twenty (20) or more hours per week not to exceed thirty (30) calendar days for each period.

"(material excised from the original)"

5.04 PART-TIME EMPLOYEES AND SHORT-SHIFT EMPLOYEES. Three to eight hours shall constitute the normal straight-time workday for part-time and short-shift premium employees. Any shift of six hours or more shall include a paid thirty-minute meal period, which period shall constitute time worked for the purpose of determining when overtime is due. Any work in excess of eight hours per day or forty hours per week and any time worked on the seventh consecutive day of the week shall be compensated for at one and one-half the straight-time rate of pay.

5.05 CASUAL EMPLOYEES. Casual employees may be assigned to shifts of not less than three hours except for employees who serve special functions, who may work shifts of two hours or more. Any work in excess of eight hours per day or forty hours per week shall be compensated for at one and one-half times the straight-time rate of pay.

5.06 SPLIT SHIFTS. Except for employees who serve special functions, there shall be no split shifts on other than six or eight-hours shifts. No shift may be split more than once in any twenty-four hour period. All split

shifts shall be worked within twelve (12) consecutive hours. Split shifts shall be paid for by adding seventy-five cents ($.75) to the shift pay except that no split shift premium shall apply to employees who serve special functions. No split shifts shall be permitted on shifts qualifying for the night shift premium as specified in Article IV, Section 4.08.

5.07 TIME BETWEEN SHIFTS. No employee may be scheduled to report within ten hours of the time of completion of the previous day's shift unless paid at time and one-half for the hours worked within the ten-hour elapsed time period.

5.08 DAYS OFF. The Employer shall post in a conspicuous place in the employees' service area a job schedule specifying the full name of each employee, each employee's days off and the starting and finishing time for each employee. All regular full-time employees shall be scheduled off on at least two full days per week. The two days off shall be scheduled consecutively, provided that in any week where the employee receives two days off on a nonconsecutive basis he or she shall be paid one-half day's pay extra as penalty for nonconsecutive days off, except where employees have volunteered to work overtime and volunteered to work special functions. All part-time and short-shift employees shall be scheduled off at least one full day per week.

("material excised from the original)"

SECTION 5. CLASSES OF EMPLOYEES

5.a Regular full-time employees as referred to in this agreement are those employees whose jobs require that they normally work regularly on a consecutive weekly schedule for thirty (30) or more hours per week on an annual basis and who are available and can be scheduled for work on any and all shifts and at all hours. All sections of this agreement shall apply to regular full-time employees.

5.b Regular part-time employees as referred to in this agreement are those employees whose jobs require that they normally work regularly on a consecutive weekly schedule for twenty (20) or more hours per week but less than thirty (30) hours per week on an annual basis and who are available and can be scheduled for work on any and all shifts and at all hours. All sections of this agreement shall apply to regular part-time employees.

5.c Casual employees as referred to in this agreement are those employees who normally work less than twenty (20) hours per week on an annual basis and/or by reason of being a student, or for any other reason, are not available or cannot be scheduled for work on all shifts and at all hours. Casual employees who are students and work only during their vacations may be paid up to fifteen cents (15¢) per hour less than the job rate but not less than the statutory minimum wage rate.

5.d Employees shall, at the time of hire, be designated to be in one of the three classes of employees, depending upon the nature of the job and the availability of the employee. At any time, in the event of a dispute as to whether or not a job is regular or full-time, regular part-time, or casual, that matter shall be processed under the grievance procedure. In the event a job is posted for one class of employees and at the later date it is found to be for another class of employee, the job shall be re-posted.

5.e The term "on an annual basis" as used herein has reference to particular jobs considering an entire year of a Hotel's operations. Therefore, a person classified as a regular part-time employee does not become a regular full-time employee by merely working a number of weeks at one or more periods during the year for more than thirty (30) hours per week. When an employee has worked at a particular job on an annual basis of thirty (30) hours a week or a particular job becomes such that an employee will be required to work regularly on a consecutive weekly schedule for more than thirty (30) hours a week on the basis of an entire year of Hotel operations, then such job will be reclassified as a regular full-time job and shall be posted. However, jobs occupied for one (1) or more years, which are designated for another class of employee, need not be posted.

5.f It is understood that reference to hours in this section is related only to the matter of the definitions of classes

of employees and in no way refers to maximum work opportunity.

"(material excised from the original)"

6.03 REGULAR FULL-TIME EMPLOYEES. Six, seven or eight hours, (which includes a thirty-minute paid meal period) shall constitute the normal workday for regular full-time employees. Any work performed in excess of 8 hours per day, 40 hours per week, or on the sixth day of the workweek shall be compensated at one and one-half (1-1/2) times the normal straight-time rate of pay. Any work performed on the seventh day in the workweek shall be compensated at double (2) the normal straight-time rate. The overtime provisions for work on the sixth or seventh days of work shall not apply when such overtime is caused by schedule changes. The 30-minute paid meal period shall constitute time worked for the purpose of determining when overtime is due. As an exception to the provisions of this paragraph, bartenders may be scheduled for eight-hours without providing a paid meal period, subject to the payment of $.125 per hour premium pay for no relief. The workweek shall start at 12:01 a.m. Saturday and end at 12 midnight the following Friday. Except where business conditions require, no employee shall be scheduled for more than five (5) consecutive days.

6.04 REGULAR SHORT-SHIFT EMPLOYEES. Three to eight hours shall constitute the normal straight-time workday for regular short-shift employees except for banquet department employees, who may work shifts of two hours or more. Any shift of six hours or more shall include

a paid thirty-minute meal period, which period shall constitute time worked for the purpose of determining when overtime is due. Any work in excess of eight hours per day or forty hours per week and any time worked on the seventh day of the work week shall be compensated for at one and one-half (1-1/2) the straight-time rate of pay.

6.05 CASUAL EMPLOYEES. Casual employees may not be assigned to shifts of not less than three hours except for banquet department employees, who may work shifts of two hours or more. Any work in excess of eight hours per day or forty hours per week shall be compensated for at one and one-half (1-1/2) times the straight-time rate of pay.

("material excised from the original)"

RECOGNITION

2.1 The Hospital recognizes the Union as the exclusive bargaining agent with respect to wages, hours, and other terms and conditions of employment for all environmental aides, environmental specialists, dietary workers, laundry workers, transport specialists, elevator operators, maintenance employees, central service technical assistants, nursing attendants, psychiatric aides, community health aides, lab helpers, operating room attendants, mail room clerks, unit clerks, and geriatric technicians. The unit specifically excludes supervisors, temporary and casual employees, regular part-time employees normally working less than

seventeen (17) hours per week, and all other employees of the Hospital

2.2 Unless the context clearly indicates otherwise, the term "employee" as used in this Agreement means only a person employed by the Hospital in the bargaining unit described in Section 2.1.

("material excised from the original)"

Part I. SURVIVOR BENEFIT INSURANCE FOR EMPLOYEES

Section 1. Eligibility:

All employees of the Company who are in a job classification represented for collective bargaining purposes by

"(material excised from the original)"

and who are credited with one or more years' service are eligible for Survivor Benefit Insurance under this Plan.

For the purpose of determining eligibility, the term "employee" means a person who is regularly performing the duties of an established full-time job or position, but does not include persons working on a temporary, part-time or casual basis. The status of employee as defined herein will continue while the individual is absent from work to the extent determined by the Company in accordance with its regulations.

"(material excised from the original)"

9.3 Minimums

Employees who have seniority with their Employer and who are ordered to report to work on any day other than Saturday, Sunday, and holidays and who do so at the specified time shall receive a minimum of eight (8) hours' work, or if eight (8) hours' work is not furnished, a minimum of eight (8) hours' pay at the straight-time rate. Employees having seniority who are ordered to report for work on Saturday, Sunday, and holidays and who do so at the specified time shall receive a minimum of four (4) hours' work, or if four (4) hours' work is not furnished a minimum of four (4) hours' pay at the applicable rate; provided, however, that such minimums on Saturdays and Sundays are not applicable to continuous shift workers whose regularly scheduled days off shall be substituted for Saturdays and Sundays.

All other employees, including casuals, who are called by the Employer to report for work on any day other than Saturdays, Sundays, and holidays shall receive a minimum of either eight (8) hours' work or work for the balance of the regularly scheduled shift upon which they report, whichever is less. Employees not having seniority with their Employer, including casuals, who are ordered to report to work on Saturdays, Sundays, and holidays and who do so at the specified time shall receive a minimum of four (4)

hours' work or if four (4) hours' work is not furnished a minimum of four (4) hours' pay.

If an extra worker is called by the Employer to report for work, and, upon reporting, finds that his services are not needed, he shall receive two (2) hours' pay. Workers reporting for work who are unacceptable to the Employer shall receive no pay.

"(material excised from the original)"

Section 2. Hiring Hall standards

"(material excised from the original)"

and the Union recognize the necessity of having available at all times a supply of competent employees with experience in the scavenger industry in the geographical area.

a. There shall be a Pool of casuals established to cover absentees. This Pool shall consist of not more than twenty-five (25). The Purpose of the Casual Pool is to break in on garbage collection routes, and shall be used in filling unscheduled vacancies before notifying the Union or its Hiring Hall. The list of the Pool casuals will be mutually agreed to between the Company and the Union. Casual pool employees will be required to pay the current Hiring Hall fee for any month in which they work. The Union will provide signed authorizations for each employee in connection with Article 21.

Except in case of emergency, the Company shall advise the Union three (3) working days in advance of the name of any person that the Company intends to add to or delete from the casual pool list. Except upon objection by the Union for good cause shown, the Company shall be free to make such additions or deletions upon completion of the three (3) working day period.

b. Whenever the Employer requires regular workmen, he shall notify the Union or its Hiring Hall, stating the location, the type of work to be performed and the number of workmen required.

"(material excised from the original)"

20.533 Men checked in for work who refuse any work opportunity offered in their category (skilled, unskilled) will not be given availability credit. EXCEPTION: Dock preference men shall be exempt from work on ship.

20.5331 In addition to Section 20.533 above, a Class "A" registered man will be deemed unavailable if he did not accept work when work was available to him and a Class "B" man or a casual was employed in his category (skilled or unskilled) on his assigned shift during the Monday-Friday period. A Class "B" registered man will be deemed unavailable if he did not accept work when work was available to him and a casual was employed on his assigned shift during the Monday-Friday period.

20.5332 The reference to 'category (skilled or unskilled)' in

Sections 20.533 and 20.5331 means that a skilled man is required to accept only skilled work for which he is qualified unless Section 20.7241 is applicable. Unskilled men are required to accept any unskilled work.

"(material excised from the original)"

Article 4
PER DIEM NURSE

A. DEFINITION

1. This Article sets forth the terms and conditions of Per Diem Nurse employment. Requirements for maintaining Per Diem Nurse status are established by the University, and may vary at each location. Per Diem Nurses are those employed in University title codes 9119, 9121, 9122 and 9160. Per Diem Nurses are neither career nor casual employees. Standards of the University's position descriptions must be met as follows:

9119 -	Per Diem Nurse - Clinical Nurse II
9121 -	Per Diem Senior Nurse Anesthetist - Senior Nurse Anesthetist
9122 -	Per Diem Nurse Anesthetists - Nurse Anesthetist
9160 -	Per Diem Nurse Practitioner - Nurse Practitioner II

Per Diem Nurse work assignments add to or substitute for career and casual nursing staff on a pre-scheduled basis or as needed on a day-to-day basis, as determined by the University. Per Diem Nurses may be scheduled or not scheduled, or called off from a pre-established schedule. Additionally, a Per Diem Nurse's eligibility for scheduling may be discontinued at any time at the sole discretion of the University and without recourse to the grievance and arbitration procedures of this Agreement.

2. Per Diem Nurses are not eligible for shift differential or for benefits under Article 16, Benefit Coverage. Per Diem Nurses are not eligible for paid time off such as vacation, sick leave, holidays, leaves of absence, or educational leave. At the mutual agreement of the University and the Per Diem, Nurse, her/his Per Diem Nurse status may be temporarily held in abeyance.

B. COVERAGE

Per Diem Nurses are covered by the following Articles of this Agreement: Recognition, Nondiscrimination in Employment, Practice Committee, Management Rights, Job Posting, Release Time, Work Rules, Per Diem Nurse, No Strikes, Severability, Waiver,

Duration, Overtime Eligibility, Dues Deduction, Nurse Lists, Access, Health and Safety, Assignments, Indemnity, and the related portion of the Salary Article. Per Diem Nurses may use the grievance and arbitration procedures of this Agreement only with respect to alleged violations of those Articles by which they are covered.

"(material excised from the original)"

(2) Employees who are not eligible for regular coverage shall for the purposes of this Section 16.2 be called "casual employees." The Employer will pay a stipulated sum for each straight-time hour worked by such casual employees (and for each straight-time hour worked by employees who are working as casuals while on extended coverage), such agreed sum per hour to be computed to the nearest One-fourth Cent (1/4¢) by dividing by 173.3 the monthly contribution required for regular coverage. Such hourly sum shall be collected by the Association from its members each month.

These funds will first be used for the purpose of providing extended coverage for those employees eligible for such coverage under the provisions of this Section 16.2. Any balance remaining will constitute Trust reserves, the application of which will from time to time be mutually determined by the Association and the Union.

The sums so collected by the Association may be combined with like sums collected from non-Association

employers if necessary to effect any application which is mutually agreed upon, provided that monies paid by such other employers with respect to such casuals shall be at rates not less than the same rate as is paid by the Association members for each hour worked.

The Employer may if he wishes place a casual employee under regular monthly coverage upon commencement of employment or prior to his eligibility date for regular coverage, in which event the required hourly contributions for such casual employee shall cease upon the date on which such regular coverage is made effective for the employee.

An employee eligible for regular coverage who by virtue of having two (2) or more years' seniority with his Employer at the time of his layoff receives extended coverage from the Trust fund shall not be eligible for more than four (4) months of such extended coverage in any twelve (12) month period irrespective of the number, frequency, or length of his layoff periods. If the cost to the Trust of extended coverage for laid-off employees, as herein provided, becomes excessive in the opinion of either the Union or the Association, the provisions for extended coverage shall be subject to renegotiation at the request of either party.

"(material excised from the original)"

ARTICLE II
MANAGEMENT AND UNION RELATIONS

"(material excised from the original)"

Section IV

The Union and the College will not engage in subterfuge for the purpose of defeating or abating the provisions of this Agreement. College shall maintain a "casual" list of employees from which temporary vacancies can be filled who will not accumulate seniority unless employed continuously for a period of ninety (90) days.

"(material excised from the original)"

Section 5. Notification

(a) Casual Employees. For casual employees who work on broken time or day to day basis for various employers, the Local Hiring Hall shall immediately supply such help to the Employer upon notice by the Employer that such casual employees are needed. In the event such casual help is not immediately available or the Local Hiring Hall is closed, the Employer may then hire such casual workers from any other available source.

The Employer shall hire all casual or extra help in accordance with the terms of the hiring procedure outlined in the Local Union territorial jurisdiction where the work is performed. However, where there is a heavy demand for casual or extra helpers in areas where loading and unloading is done, such casual or extra helpers may be permanently assigned to such areas.

"(material excised from the original)"

Lamperson Fruit & Produce
Account No. 4629200-0103
Audit Period: 9/28/80-9/24/83
Meeting with Local Re: Contract

On 11/9/83 Connie Borek & Carol Evans visited local 688. Lamperson's business agent, Charles Bryson, was not in so we met with Rick Duffy, a business agent who used to handle the fruit & produce contract. Per Rick Duffy:

1. The owners of the companies did not negotiate the contract and generally do not understand the contract. /phone log with produce assoc. atty who negotiated the contract is at A7.2

2. There is no limit to the number of casual employees compared to regular employees.

3. Produce Row has had many labor problems.

4. Casual employees can receive pay at a higher rate than what's specified in the contract & casuals can work full time for a long period of time (for example 10 years) without becoming regular.

5. The employer decides who & how many employees they want to hire as casuals & how many employees they hire as regulars.

6. Casual employees pay union dues. We visited the business office at _____ not find any _____

dues paid by casual employees
_____ Lamperson

/s/ Carol K. Evans Prepared by

/s/ Constance Borek 11/83 Reviewed by

Meeting with Local Re: Contract 382

11/11/83 A10.6

TELEPHONE CONVERSATION: 0407-10-04
PREPARED BY: Carol Evans

DATE: 11/10/83 TIME: 10:30
RE: (COMPANY NAME) Lamperson Fruit
ACCOUNT NO: 4629200-0103
INCOMING: X OUTGOING: 314 658 5747
SPOKE TO: Charles Bryson
OF: Local 688
LENGTH OF CONVERSATION:
Casual vs. Regular - Casuals don't necessarily work full time But it is possible for casuals to work full time for a period of years. I asked then how could I distinguish between the two. He said casuals are hired as casuals & regulars get pension contributions paid on them. Casuals pay union dues. He will have a list ready in room 210 for Connie to pick up when she's down on Monday. He said if there are employees other than whats on the casuals list or dues check off they could be "swamper" (people who hang around & work, but haven't been caught by the local). Also, Brison said a casual can become regular to replace someone who left permanently. There is no required amount or limit of regulars & casuals.

12/18/80 jls

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Supreme Court, U.S.
FILED
JUN 17 1991
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(3)

No. 90-1764

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals correctly determined that employers are bound by the unambiguous written provisions of their collective bargaining agreements to make contributions to a pension plan on behalf of certain employees notwithstanding the employers' assertions that the collective bargaining parties had an unwritten understanding that was not disclosed to the pension plan to apply an unconventional meaning to one of the contract terms that would defeat the contribution obligation on behalf of those employees in violation of the pension plan's trust agreement.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-1764

INDEPENDENT FRUIT AND PRODUCE COMPANY, *et al.*,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

RESPONDENTS' OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The Central States, Southeast and Southwest Areas Pension Fund ("Central States") and one of its trustees, Howard McDougall, brought this action under Section 515 of ERISA, 29 U.S.C. § 1145, to collect contributions due the pension plan from petitioners and others under their collective bargaining agreements to make contributions on behalf of their employees for pension benefits. Under the agreement contributions were due on bargaining unit employees but were not due on "casuals." This action was brought when, following an audit, Central States determined that certain long-time employees were work-

ing full time but were not being reported as plan participants, and no contributions were made on their behalf, because the employers categorized them as casuals.

The employers responded that the union and they had agreed on a special meaning for the term "casual" and that it meant whomever they so designated. This special meaning was not conveyed to Central States. Moreover, such a meaning would have violated Central State's plan and trust that prohibit splitting a bargaining unit (some employees covered and some not covered). The employers asserted that Central States was bound by the collective bargaining "usage" of the term whether disclosed or not. The district court agreed.

The United States Court of Appeals for the Eighth Circuit reversed the district court. The court referred to *Black's Law Dictionary* (5 ed. 1979) for the definition of "casual employment." The definition was clear, relating the term to temporary, irregular or incidental employment, and was completely at odds with the asserted usage of the collective bargaining parties. The dictionary definition was consistent with the collective bargaining parties original usage of the term, with the language of pre-1982 collective bargaining agreements, and with Central States' understanding of the term. See opinion below, 919 F.2d at 1350 (Appendix at A50). Applying a basic rule of contract interpretation, the court held the employers bound by the ordinary meaning of this unambiguous term. The court also held that a pension plan may not, under ERISA, be bound by an unwritten, unconventional definition of a term that would defeat the pension plan's obligation to collect contributions on behalf of its participants.

REASONS FOR DENYING THE WRIT

Petitioners cite as sole ground for this Court to issue a writ of certiorari that the decision of the court of appeals "conflicts with an unbroken string of decisions

of this Court" regarding interpreting contracts between collective bargaining parties. Petition at 17 (hereinafter cited "Pet. at ——"). As we show below, petitioners' conflict is illusory. The court of appeals decision is entirely consistent with applicable decisions of the Court. Respondent Central States is a pension plan—not a collective bargaining party—that is bound by the terms of a separate trust document under which it may agree to provide pension benefits in accordance with the trust agreement, and that is not bound to the undisclosed meaning ascribed to standard terms by collective bargaining agreement parties that conflict with the terms of the trust.

While not citing it as a ground for this Court's review, petitioners also suggest that the court of appeals incorrectly decided an important question of federal law by placing collective bargaining agreements in jeopardy of being "judicially rewritten to the detriment of institutionalized collective bargaining and labor peace." *Id.* Petitioners are wrong. Collective bargaining agreements are in no danger of being judicially rewritten. The court of appeals only ruled that a third party pension plan that is induced to rely on such agreements is not bound by an undisclosed understanding of the collective bargaining parties to apply a non-standard definition to a commonly understood word. This decision is entirely consistent with applicable decisions of other courts of appeals (and conflicts with none). Thus there is no important question of federal law nor conflict among the courts for this Court to settle.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH NO DECISION OF THIS COURT

Petitioners cannot really point to any particular decision of this Court with which the court of appeals decision directly conflicts. Thus, petitioners allege only in general terms that the court of appeals "fails to follow

the principles of labor contract interpretation." Pet. at 19 (heading). The principle supposedly set out in a stream of decisions from *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) to *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), that petitioners seek to uphold is that "foremost importance be given to the parties' intentions." Pet. at 19. But what petitioners really mean is that contracts be construed to give overriding effect to the unwritten, subjective intentions of the parties. Thus, petitioners argue, since the court of appeals applied the commonly accepted, dictionary definition of the term "casual" to the contract instead of the parties unwritten special definition of the term, the court failed to implement the intent of the parties. But this Court has never held that the subjective intent of contracting parties should override the express terms of a contract—especially insofar as the contract implicates the rights and obligations of third parties, such as Central States, who were not privy to the special meaning of the term and relied instead on the common definition.

Petitioners' cases, beginning with *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), do not stand for the proposition cited by petitioners. In *Steelworkers*, this Court ruled on the importance of the labor arbitrator who "performs functions which are not normal to the courts," and who is part of the system of collective bargaining self-government. *Id.*, at 581. "The labor arbitrator's source of law is not confined to the express provisions of the contract. . . ." *Id.* Petitioners' reliance on that case is thus quite misplaced. No labor arbitration is implicated here, nor is there a collective bargaining dispute. Thus, there is no need for special deference to the process at the expense of ordinary principles of construction of a contract. *See, Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364, 371-72 (1984). The *Steelworkers* case provides no principle mandating that courts *must* look

beyond the express terms of a contract. The case simply has no application to interpreting a contract's meaning to a third party pension plan.

Likewise, *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 109 S. Ct. 948 (1989), the last case of petitioners "unbroken string," also provides no support to petitioners' position. In *Firestone*, this Court stated, "[a]s they do with contractual provisions, courts construe terms in trust agreements without deferring to either party's interpretation." 109 S. Ct. at 955. This is a far cry from petitioners' cited proposition that "the parties' intention is the goal of contract interpretation whether the rights of a pension plan or other parties are affected." Pet. at 30. *Firestone* held only that in certain circumstances the courts review trustees' plan interpretations *de novo* by looking to the terms of the plan and other manifestations of the parties' intent. In plans like Central States, however, the courts defer to trustee interpretations unless they are arbitrary and capricious. 109 S. Ct. at 954 (citing *Central States, Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568 (1985)). But *Firestone* does not address any special standard for reviewing a collective bargaining agreement—especially as it affects a third party pension plan. The court of appeals violated no principle of *Firestone* by applying the usual rules of construction to the contract. Finding no ambiguity in the contract term "casual" the court simply found no need to explore the parol intentions of the parties to the detriment of a third party pension plan.

The cases in between *Steelworkers* and *Firestone* are no different and enunciate no general principle applicable here. In *Transportation-Communications Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966), this Court held it necessary that the National Railroad Adjustment Board exercise its jurisdiction over a dispute involving two collective bargaining agreements by looking at both contracts, even though the union party to one

contract declined to participate, because the interpretation of one contract affected the other. The case does not suggest that the Board or courts look beyond the confines of the two agreements. But even if the Board could look beyond the express terms, it seems highly unlikely that it (or this Court) would rule that an unwritten, unconventional definition purportedly used by the parties to one agreement would override the express terms of the second to the detriment of the party not in privity to the first agreement. Likewise petitioners' collective bargaining understanding may not override respondents' trust agreement.

In *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430, 87 S. Ct. 559, 565 (1967), this Court held only that the NLRB had power to interpret a disputed collective bargaining agreement to determine whether a violation of the NLRA (not the contract) had occurred. The case does not hold that the NLRB (or a court) *must* look to the subjective intent of the parties. It only notes that the NLRB did look at the history of negotiations to determine whether the Act was violated, and the Court could not say that the NLRB was wrong to do so. *Id.* Not before the Court in that case was the applicability of the contract to third parties. Thus, no principle of that case was violated by the court of appeals here that found it unnecessary to look beyond the confines of the agreement with regard to its applicability to Central States.

Schneider Moving & Storage Co. v. Robbins, 466 U.S. 364 (1984), especially does not support any principle of overriding subjective intent. While in *Schneider* this Court referred to the parties' intent, it sought that intent within the confines of the contract. Indeed *Schneider* underscores a key distinction of this case that petitioners overlook. This Court noted in *Schneider* that the benefit funds were separate from the collective bargaining parties and thus the Court looked first to the *trust* agreement for evidence of the intent of *parties to the trust* to

arbitrate. *Id.* at 374. Finding no such evidence in the trust, the Court considered *arguendo* whether the collective bargaining parties had shown such intent in that agreement, and found none. *Id.* The Court never suggested that the collective bargaining agreement might override the trust. Since neither trust nor contract showed evidence of any intent to require arbitration, the inquiry ceased.

In sum, the cases relied upon by petitioners generally sought to ascertain the intent of the contracting parties within the confines of the written agreement. The only cases suggesting that the deciding body look outside the agreement relied on the special relationships of labor boards and labor arbitrators to the collective bargaining process, a relationship not applicable here. The only case remotely similar to the instant case is *Schneider* that limited its review of the parties' intent to the written documents, and that noted the special posture of the pension plan as an entity distinct from the collective bargaining parties and primarily controlled by the trust document. There the intent of the settlors of the trust, not the collective bargaining parties, was paramount.

II. THE COURT OF APPEALS DECISION IS CONSISTENT WITH OTHER DECISIONS OF THIS COURT AND WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND PRESENTS NO IMPORTANT FEDERAL QUESTION FOR THIS COURT TO SETTLE

Petitioners correctly observe the major flaw in their position provided by *Lewis v. Benedict Coal Corp.*, 361 U.S. 459 (1960). There this Court held that defenses the collective bargaining parties might assert against each other were not necessarily defenses against a pension plan seeking to assert its own rights under the contract. No more should the parties be allowed to assert a special understanding of the meaning of the contract.

As argued above, the court of appeals was correct in relying on the terms of the contract itself and not the parties' unwritten, non-standard understandings. That being a sufficient ground for the decision, the court did not address the *Benedict* line of cases (that had been briefed to it). But if the court of appeals had given cognizance to the collective bargaining parties understanding, it would have been obligated to render that understanding ineffective to the extent it conflicts with the trust agreement of a third party pension plan. The courts of appeals are in full accord. An unwritten side agreement would violate Section 302(c)(5) of the Labor Management Relations Act. 29 U.S.C. § 186(c)(5). See, e.g., *Central States Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148 (7th Cir. 1989) (*en banc*); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986); *Moglia v. Geoghegan*, 403 F.2d 110 (2d Cir. 1968). The parties' unconventional use of the term "casual" rises to the level of an unwritten agreement to employ the term specially.[1]

In 1980 Congress provided additional protection to pension plans by enacting Section 515 of ERISA, 29 U.S.C. § 1145. The congressional sponsors indicated, "we endorse judicial decisions such as *Lewis v. Benedict Coal. . . .*" *Gerber*, 870 F.2d at 1153 (citing 126 Cong. Rec. 23039 and 23288). In *Gerber* the Seventh Circuit had occasion to consider the effect of a secret side agreement on a pension plan under Section 515. The plan in *Gerber* (the same plan as respondent Central States) provided a prohibition against splitting a collective bargaining unit. 870 F.2d at 1155 and note 4. The court held that an undis-

[1] Petitioners admit that originally the parties used the term "casual" in its common sense to mean employees necessary "to level labor demands which were 'irregular and unpredictable.'" Pet. at 15. Over time the use of the term evolved, apparently, to the unconventional meaning they now espouse. Of course no one told Central States who might have objected or refused to cover the bargaining unit because of the conflict with the terms of the trust.

closed (to the pension plan) agreement to split a unit must give way to the mandate of Section 515 of ERISA that the pension plan enforce the written obligation to contribute. The other courts of appeals are in full accord. *See, e.g., Central States, Southeast and Southwest Areas Pension Fund v. Behnke*, 883 F.2d 454, 459-61 (6th Cir. 1989); *Bituminous Coal Operators' Ass'n, Inc. v. Connors*, 867 F.2d 625, 633-35 (D.C. Cir. 1989); *Pierce County Hotel Employees Trust v. Elks Lodge*, 827 F.2d 1324, 1328 (9th Cir. 1987). Petitioners' unwritten understanding had the effect of splitting the bargaining unit into casuals and non-casuals in a manner contrary to the trust. Petitioners, like Gerber, could have anticipated that had they approached the Central States with their real intent, "the funds would have replied 'No.'" *Gerber*, 870 F.2d at 1155. Had the pension plan known of the unconventional definition it might have rejected the employer's participation or required a modification. By the parties' employing, and not disclosing, the unconventional meaning of the term, Central States was denied the opportunity to enforce the trust as to that meaning. Now it is too late and Central States must enforce Section 515.

In an apparent attempt to show that Central States should have been more vigilant regarding potential deviant meanings of the term, petitioners have provided in their appendix a study purporting to show the many uses and meanings collective bargaining parties put to the term "casual." What is striking about this study, however, is the implicit (and sometimes explicit) acceptance of the dictionary definition of the term such that when the parties deviate from the conventional definition, they explain the deviation in some detail in the contract itself. The study thus completely undercuts petitioners' position that they could rely on an unwritten, special definition of the term.

Since petitioners did not set forth their meaning in the contract, the court of appeals had no contract term to re-

write. There is absolutely no suggestion in the decision that courts might rewrite a contract, but only that they enforce its express terms. As the court of appeals noted, "we merely reaffirm a basic rule of contract interpretation. 'A signatory to a contract is bound by its ordinary meaning even if he gave it an idiosyncratic one; private intent counts only if it is conveyed to the other party and shared.' " 919 F.2d at 1353 (citing *Robbins v. Lynch*, 836 F.2d 330, 332 (7th Cir. 1988)). Accordingly, there is no serious federal question for this Court to resolve. The question is already resolved against petitioners' position by all courts to consider it.

CONCLUSION

For the foregoing reasons, respondents submit that the petition for a writ of certiorari be denied.

Respectfully submitted,

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(4)

No. 90-1764

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

INDEPENDENT FRUIT AND PRODUCE COMPANY, et al.,
Petitioners,

v.

CENTRAL STATES, SOUTHEAST and SOUTHWEST AREAS PENSION FUND, et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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INTRODUCTION

The Opposition of Respondents, Central States, Southeast and Southwest Areas Pension Fund and Howard McDougall (together "Central States"), to the Petition for Writ of Certiorari raises significant factual and legal issues not treated by the Petition. Most importantly, contrary to the evidence and the trial court's findings, Central States implies or directly argues that: (1) there is a standard definition of "casual employee" to which all collective bargainers subscribe; (2) that this standard definition was known to Central States and relied upon by it (Brief in Opp. 4); (3) that had Central States known this standard definition was not shared by Petitioners, Central States would have rejected the thirty-year series of collective bargaining agreements (Id. at 9); (4) that

Petitioners concealed their "subjective intentions" to use this supposedly non-standard definition (Id. at 4); and (5) that Central States was, moreover, "induced to rely" upon the standard definition (Id. at 3). None of these assertions is supported by the record.

Only the first argument, that there is a binding standard definition of the phrase "known as 'casual employees' (casuals)", was addressed in the Petition for Writ of Certiorari. While such a standard definition does not exist, discussion is quickly precluded by this Court's prior ruling that analysis of labor agreements does not cease with the turning of the dictionary's last page. NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1987).

DISCUSSION

1. Central States Relied Upon No Particular Definition of the Term "known as 'casual employee'" in Conducting the Audits

Factually, the argument that Central States relied upon a standard definition is unfounded. When Central States audited Petitioners, and for some time thereafter, it had no definition of "casual employee." Neither the District Court nor the Court of Appeals found that any definition was held by Central States at the time of the audit. Such a finding would be in direct conflict with the testimony of Central States' employee, Michael D'Onofrio, who was its endorsed witnesses on the meaning of "casual employee" and who had been active in the audits of Produce Row. The crux of Central States' own testimony is that casual status must be determined on a

"case-by-case basis" (Appendix to this volume 9-10). There was no definition formulated by Central States at the time of the audit (Id. at A1-A5).

Thus, Central States can claim only that, as a matter of law, it is entitled to rely upon the dictionary and, that as an additional matter of law, all parties are on constructive notice of the definition contained in Black's Law Dictionary (5th ed.). No single case for this proposition can be found, with the possible exception of the Eighth Circuit's decision in this case. Central States' own search for a definition on a case-by-case basis is predicated upon the fact that the particular situation of the parties to the collective bargaining agreement--employers, unions and employees, alike--makes a difference (Id. at A9-A10).

2. Central States Did Not Reject a Produce Row Contract Which was Submitted to it Following the Audit

Central States' assertion that it would have rejected any collective bargaining agreement mandating contributions for some workers and none on behalf of similar situated employees is belied by its conduct. The Eighth Circuit correctly notes that "The district court rejected any argument based on splitting the bargaining unit, and no such argument has been made on appeal." Appendix to Petition A40, n. 4. After filing suit against Petitioners in 1984, with full knowledge of the meaning ascribed by the parties to "known as 'casual'," in 1985, Central States accepted, without any objection, a contract between Petitioners and the Union containing the same language. By this time Central States was fully aware

of the issue and the parties' understanding of the term. Thus, Central States did not reject a contract containing what it believed to be a split bargaining unit.

3. Petitioners' Intentions Are to be Determined From All Legally Admissible Evidence

The term "subjective intentions" which appears in Central States' Brief in Opposition has no clear meaning unless taken to imply that Petitioners, with the aid and assistance of the Union, concealed aspects of their conduct from Central States. Brief in Opp. 4. Use of this term appears to be juxtaposed to the phrase "real intent." Id. at 9. No evidence at trial pointed to concealment of any "real intent", nor was a policy of concealment raised in the Court of Appeals by Central States. As is amply stated in the Petition, the traditional

tools of labor contract interpretation require examination of more than the dictionary to determine the parties' intentions; they require that courts utilize all legally admissible evidence. Firestone Tire & Rubber Co. v. Bruch, 489 U.S. ---, 109 S. Ct. 948, 955 (1989). The dictionary definition formed no part of the parties' intentions, subjective or otherwise.

4. Central States Was Not "Induced to Rely Upon" Anything

Central States claims it was "induced to rely upon" the collective bargaining agreements and presumably the dictionary definition. Brief in Opp 3. No evidence of any inducement by Petitioners, the Union or the employees was presented at trial. No evidence was brought forth that Petitioners lied to Central States. To the contrary, when Central States inquired into Produce Row

practice, it was told the facts. Appendix to Petition A221-23.

CONCLUSION

This is not a case of concealment or bad intentions. This case raises the issue of where does construction of labor contracts begin and end when the rights of pension trustees are affected. As is mentioned by the Brief in Opposition, this case engenders significant issues concerning the interplay of Section 515 of ERISA and traditional labor contract interpretation. Brief in Opp. 9. Thus, this Court should grant the Petition and issue its Writ of Certiorari.

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APPENDIX

EXCERPTS FROM THE DEPOSITION OF MICHAEL D'ONOFRIO INTRODUCED IN EVIDENCE AT TRIAL

Q. [Mr. Pasewark, Petitioners' counsel] Does Central States have a definition of casual?

A. [Mr. D'Onofrio, Respondents' endorsed witness regarding the meaning of "casual"] Yes.

Q. What is the source of Central States' definition of casual?

A. Common knowledge, which is supported in various dictionaries, which is also supported by opinions received by various attorneys, both internally and outside counsel.

Q. What dictionary are you aware of that defines casual employee?

A. I don't remember the exact name, but I have seen it several dictionaries.

Q. You are aware that there are several dictionaries that have the term casual employee defined?

A. I am not sure if it says casual employee or casual worker, but it has some reference to some type of casual employment, yes.

Q. Have you looked up those terms independently--casual and employee--and formed--

. . .

A. I have had people walk up to me and hand me a dictionary and say, 'See, here

it is.' And I don't remember how it was phrased.

Q. . . . So, you don't know whether the term casual employee appeared in any dictionary?

A. Yes.

Q. Do you believe you looked at the term casual?

A. Yes.

Q. And looked at the term employee?

A. Yes.

Q. Separately?

A. Yes.

Q. And then combined the results?

MR. HELFREY [Respondents' counsel]: I object. Look in Black's Law Dictionary. It is in there. You are getting argumentative.

Q. (BY MR. PASEWARK) Is that the dictionary you used?

MR. HELFREY: He doesn't remember.

A. I don't recall the dictionary. Just people have shown me, 'Look, here it is.'

Q. (BY MR. PASEWARK) Are there any other sources other than dictionaries upon which you have relied in reaching a determination of what a casual employee is?

A. I have relied on memoranda that we received from internal counsel.

Q. Any others?

A. And there have also been references made from our outside attorneys -- references made by outside attorneys as to what casual employees are.

Q. When was the first time that you saw this term defined in a dictionary?

A. I don't recall

Q. Before or after 1983?

A. After 1983.

Q. Before or after 1986?

A. I don't recall.

Q. Before or after you conducted the Lamperson audit [the first audit of a Produce Row employer]?

A. I don't recall.

Q. When was the first time you saw any other source of information concerning the definition of casual employee?

A. I have seen it on numerous occasions throughout my career in the field audit division, from our attorneys.

Q. Did you ever see a definition of the term casual employee prior to conducting the Lamperson audit?

A. I don't recall.

Q. How do you communicate the definition of a casual employee to persons within the field audit division?

A. We do it in training seminars that we have had specifically as people are hired into the division. We also have training seminars for updates on procedures. So, it is through an education program.

Q. Do you conduct these educational seminars?

A. I used to.

Q. What did you tell them a casual employee was?

A. A casual employee is someone who works on an infrequent basis.

Q. And how many hours do they have to work before they work infrequently?

A. We don't have a specific definition as to how many hours.

Q. Did you ever have occasion to define the term casual employee for your field audit division prior to conducting the Lamperson audit?

A. I don't recall.

Q. Did the Lamperson audit or any of the Produce Row cases cause Central States to redefine casual employee?

. . .

A. I don't believe so.

Q. . . . [W]as this one of the first audits you ever conducted?

A. One of the first group of audits.

Q. Had you ever, prior to the Lamperson audit, had occasion to deal with the term casual employee?

A. Yes, I did.

Q. And when was that?

A. That was in -- it was at least as early as August, 1983.

Q. And what context did that arise in?

A. It was in the audit of a freight company.

Q. Were there any times after the audit of the freight company and before the audit of Lamperson where you had occasion to define that term?

A. I don't recall.

. . .

Q. . . . What was the definition of casual employment with that freight company?

A. That freight company was under the National Master Freight Agreement.

Q. And the National Freight Agreement contains a definition of casual?

A. I believe it does.

Q. And do you know what that definition is?

A. Not offhand, no.

Q. . . . This might have been your second occasion, with the Lamperson audit, to look at the term casual?

A. That is right.

. . .

Q. . . . Do you recall whether any [memorandum from counsel] were generated prior to the Lamperson audit?

A. No, I don't recall.

. . .

Q. Did you ever have occasion to look up a dictionary definition of casual employee prior to the Lamperson audit?

A. I don't believe so, but I don't recall.

Q. Is the dictionary definition that you have seen of casual employee identical to the one contained in the National Master Freight Agreement?

A. I don't know.

Q. Have you ever compared the two?

A. No.

Q. Are there any other sources -- aside from dictionaries and memoranda from internal and external counsel -- that you rely upon in defining casual employee?

A. Common knowledge.

Q. And what is common knowledge?

A. Just experience in working with audits in the field audit division.

. . .

Q. Do you believe it to be common knowledge among employers in the produce industry?

A. I don't know.

. . .

Q. . . . Is it common knowledge among those persons who negotiate collective bargaining agreements for unions?

. . .

A. I don't know.

Q. Is it common knowledge for those persons who were employed subject to a collective bargaining agreement?

. . .

A. I don't know.

Q. . . . Is it conceivable to have a casual employee who works twenty hours a week?

A. I think I would need more facts to be able to answer that question.

Q. Have you ever judged someone to be a casual employee who worked twenty hours a week?

A. For just one week.

Q. For just one week.

A. They never worked again?

Q. They never worked again.

A. I am sure we have.

Q. Have you ever deemed somebody to be a regular employee who worked twenty hours one week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked forty hours a week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked eighty hours a week and never worked again?

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked two consecutive weeks and never worked again?

A. Are you talking about from the field audit standpoint or from my personal experience?

Q. From the field audit standpoint.

A. I don't know.

Q. Have you ever deemed somebody to be a regular employee who worked three consecutive weeks at twenty hours a week?

A. I don't know.

Q. How about four consecutive weeks?

A. I don't know.

Q. Five consecutive weeks?

A. At forty hours?

Q. Twenty.

A. I don't know.

Q. If they worked a whole year at twenty hours a week, have you ever deemed somebody to be a regular employee -- and they never worked again?

A. Yes.

Q. Would that mean, in your judgment, they were a regular employee?

A. Yes.

Q. If he worked six months, twenty hours a week and never worked again?

A. Yes.

. . .

Q. . . . If he worked three months at twenty hours a week, in your opinion is he a regular employee?

A. I would need additional facts.

Q. What type of facts?

A. I would need to know what he was doing. I would need to see the wage involved. I would need to see what the contract was. It would depend on the employer and the local union. There is a bunch of variables. And we review those

on a case-by-case basis. It would depend on the probation period in the contract.